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In The
Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Petitioner,

vs.

TEXTRON FINANCIAL CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Fourth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the California Court of Appeal commit constitutional error and improperly depart from this court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), by holding that a $1.7 million punitive damage award 20 times the relevant compensatory damages did not deny the defendant due process under the Fourteenth Amendment to the United States Constitution, where the case did not involve any of the special circumstances this court held might support a punitive damage award exceeding a single-digit multiple of compensatory damages?

2. Did the California Court of Appeal commit constitutional error and improperly depart from this court's decision in *BMW* by evaluating the amount of a punitive damage award in light of punitive damage awards in previous cases rather than in light of legislatively authorized civil and criminal penalties for comparable misconduct?

PARTIES TO THE PROCEEDINGS AND SUPREME COURT RULE 29.6 STATEMENT

Petitioner National Union Fire Insurance Company of Pittsburgh, Pennsylvania was the defendant, appellant, and cross-appellee below. Respondent Textron Financial Corporation was the plaintiff, appellee, and cross-appellant below. Petitioner is wholly owned by American International Group, Inc. and has one non-wholly owned subsidiary, JI Accident & Fire Insurance Co., Ltd. (Japan).

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PETITION FOR WRIT OF CERTIORARI

National Union Fire Insurance Company of Pittsburgh, Pennsylvania (National Union) respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of California, Fourth Appellate District, in this case.

OPINIONS BELOW

This court's October 9, 2001 order granting National Union's prior petition for a writ of certiorari is reported at 534 U.S. 947 (2001). The June 28, 2002 opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Three is unreported and reproduced in the appendix (App.) at 1. The January 29, 2001, opinion of the Court of Appeal is unreported and reproduced at App. 33. The May 29, 1996, judgment of the Superior Court of the State of California, Orange County, is unreported and reproduced at App. 62. The July 29, 1996, order of the Superior Court conditionally granting a new trial is unreported and reproduced at App. 72. The May 2, 2001 order of the Supreme Court of California denying National Union's petition for review from the Court of Appeal's January 29, 2001 opinion is unreported and reproduced at App. 78. The May 4, 2001 order of the Supreme Court of California correcting a clerical error in its May 2, 2001, order is unreported and reproduced at App. 79. The September 25, 2002 order of the Supreme Court of California denying National Union's petition for review from the Court of Appeal's June 28, 2002 opinion is unreported and reproduced at App. 80.

JURISDICTION

The judgment of the Court of Appeal was entered on June 28, 2002. App. 1. On September 25, 2002, the Supreme Court of California denied National Union's timely petition for review. App. 80. The jurisdiction of this court is invoked pursuant to 28 U.S.C.A. § 1257(a) (West 1993).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Background.

This $1.7 million punitive damages case arises out of a claim for damage to a bus. In 1992, Il Sung Ko, the operator of a Los Angeles tour bus company, purchased an insurance policy covering his fleet of buses. Through Douglas Ferguson, an independent insurance broker, Ko obtained a National Union insurance policy issued by TRM International (TRM), an independent company acting as a "managing general agent" for National Union.[1]

[1] The term "managing general agent" is a term of art in the insurance field; it describes a company that markets and issues insurance policies on behalf of insurance companies pursuant to an agency agreement.

Respondent Textron Financial Corporation (Textron) had a security interest in one of Ko's buses and was named as loss payee on the National Union insurance policy. The policy's loss payable endorsement specified that if National Union were to cancel the policy, Ko and Textron would receive "the same advance notice."

After he purchased the National Union policy, Ko's financial situation declined, and he purportedly stopped using two of his buses, including the bus financed by Textron. Ferguson advanced Ko several thousand dollars in insurance premiums during that time. In late 1992, when Ko was unable to pay Ferguson back and after TRM, on behalf of National Union, threatened to cancel Ko's policy, Ko and Ferguson requested that TRM delete coverage of the two supposedly idle buses and issue a "premium credit" for the deleted vehicles. The deletion endorsement negotiated by the parties in late 1992 staved off cancellation of Ko's entire policy and enabled him to operate the rest of his fleet; in addition, Ferguson testified that the accompanying refund in the form of a premium credit would have repaid him for the substantial amount of money he had fronted to Ko. TRM prepared an endorsement to the policy stating that coverage for the bus had been deleted. Although TRM's records indicate that a copy of the endorsement was mailed to Textron, Textron denied receiving it.[2]

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[2] The deletion endorsement was effective as of December 1, 1992, but was not generated until February 1993. According to TRM, the delay was attributable to a backlog in administrative paperwork.

Ko continued to use the Textron-financed bus despite claiming to have garaged it, and in January 1993, the bus was involved in an accident. Ferguson notified the American International Adjustment Company (AIAC) – a company affiliated with National Union and vested with authority to investigate, approve, defend, or deny claims by or against National Union and its insureds – that the accident had occurred, and that Ko had previously requested the bus be deleted from the policy. A TRM supervisor confirmed Ferguson's statement and AIAC accordingly informed Ko that coverage would be denied.

Textron learned about the accident – and the deletion from the policy of the Textron-financed bus – several months later, after Ko defaulted on his loan obligations. Textron sued Ko for the balance due on the loan and secured a judgment against him, which Ko subsequently discharged in a bankruptcy proceeding. Textron also submitted a claim to National Union for $61,000 in property damage to the bus. After a lengthy investigation, National Union denied Textron's claim, concluding that it was not obligated under the policy to notify Textron of the cancellation by Ko.

B. Textron's lawsuit against National Union.

Textron sued National Union and AIAC, alleging breach of contract, breach of the covenant of good faith and fair dealing, conspiracy, and fraud.[3] Textron's contract

[3] Textron also brought claims against National Union and AIAC under California's unfair business practices statute. Those claims were

(Continued on following page)

claims were based on the parties' dispute over whether the loss payable endorsement required National Union to provide a lienholder with advance notice if a vehicle was deleted at the insured's request. Textron's conspiracy and fraud claims were grounded in a more sinister theory, however: that in fact the bus had not been deleted from the policy before the accident.

According to Textron, following the accident, Ferguson, Ko's broker, and various TRM employees had engaged in a complicated "post-accident underwriting" scheme to mislead both Textron and National Union into believing that coverage for the bus had been canceled before the accident, when in fact the bus was subject only to a "lay up credit" – a procedure sometimes used by a commercial insured with a fleet of vehicles who experiences a temporary lull in business. Under a lay up credit, coverage remains in effect, but the insurer provides a credit for the period of time the vehicle temporarily is out of service. Textron further claimed that TRM officials had fabricated various documents to support its position that the bus had been deleted from the policy. According to Textron, the purpose of this intrigue was to allow Ferguson, who had advanced Ko's premiums, to recoup those advances through a premium credit. Textron claimed that Ferguson and TRM were concerned that if National Union learned that the bus was still insured, it would refuse to provide a premium credit. Relying on a California statute, Cal. Civ. Code § 3294(b) (West 1997), which permits an award of punitive damages against a principal for the conduct of its

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dismissed prior to trial. In the same complaint, Textron also sued TRM and Ferguson for negligence. Both settled before trial.

"managing agent," Textron argued that punitive damages should be awarded against National Union because TRM was acting as National Union's managing agent.

At trial, the court ruled that National Union could not terminate Textron's rights as a loss payee without advance notice to Textron. Textron's contract damages claim, its claim for insurance bad faith, and its fraud and conspiracy claims were then tried to a jury, which found National Union liable for the money payable under the insurance policy. App. 63. The jury also concluded that National Union had committed insurance bad faith, rendering the company liable for approximately $86,000 in attorney's fees and costs incurred by Textron to prosecute this action. App. 64. The jury further concluded that AIAC had not made misrepresentations knowingly or with an intent to defraud, but that National Union had made such representations. App. 65-66. The jury awarded Textron $3,859.50 in compensatory damages on its fraud claim, representing the legal fees incurred when, relying on the purported misstatements that coverage had been deleted, Textron pursued Ko for damages. App. 67. The jury then awarded Textron $10 million in punitive damages against National Union. App. 70.

On National Union's motion, the Superior Court granted a conditional new trial, unless Textron agreed to a remittitur of the punitive damage award to $1.7 million. App. 72. Textron accepted the remittitur, App. 2, and National Union appealed.[4]

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[4] Textron filed a cross-appeal, claiming, among other things, that the trial court erred in granting the remittitur.

C. The first decision of the California Court of Appeal.

On appeal, National Union argued that even with the trial court's remittitur, $1.7 million in punitive damages was excessive and violated National Union's right to due process under the Fourteenth Amendment to the United States Constitution. National Union explained that the three "guideposts" set forth by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-575 (1996), mandated a finding that the trial court had erred in awarding Textron a colossal sum in punitive damages on a claim for a small fraction of that amount. Addressing each *BMW* factor at length, National Union argued that the trial court's punitive damage award constituted an "arbitrary deprivation of property" in violation of the Fourteenth Amendment's due process clause. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994).

The Court of Appeal affirmed. App. 3. Citing its decision in *Stevens v. Owens-Corning Fiberglas Corp.*, 57 Cal. Rptr. 2d 525 (Ct. App. 1996), the court stated that "[o]n appeal, a judgment awarding punitive damages *is presumed to be correct* and will be reversed only if the record, *viewed most favorably to the judgment*, reflects the award is the result of passion or prejudice." App. 59-60 (emphasis added). The Court of Appeal concluded that the $1.7 million punitive damage award was "not excessive, nor does it violate National Union's constitutional right to due process of law." App. 61.

Following the Court of Appeal's decision, National Union filed a petition for review in the Supreme Court of California, arguing that the appellate court had failed to "conduct an independent review of the size of a punitive

damage award" to ensure the award conformed with the Fourteenth Amendment. Pet. for Review 1. The Supreme Court of California denied review without comment on May 2, 2001. App. 78.

D. National Union's first petition for writ of certiorari.

National Union filed a petition for writ of certiorari in this court, contending that the Court of Appeal failed to conduct a de novo review of the size of the punitive damage award as required by *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). On October 9, 2001, this court granted the petition, vacated the Court of Appeal's January 29, 2001 opinion, and remanded the case to the Court of Appeal for reconsideration in light of *Cooper*. *National Union Fire Ins. Co. v. Textron Financial Corp.*, 534 U.S. 947 (2001).

E. The second decision of the California Court of Appeal.

On June 28, 2002, the Court of Appeal once again affirmed the judgment of the superior court. App. 1. Purporting to review the judgment de novo, it held the $1.7 million punitive damage award was not constitutionally excessive under the three *BMW* guideposts: (a) addressing the first *BMW* guidepost – "the degree of reprehensibility of the defendant's conduct" – the Court of Appeal held the conduct in question was sufficiently reprehensible to support $1.7 million in punitive damages even though TRM, not National Union, committed the wrongdoing, and National Union's liability for TRM's actions was merely vicarious, App. 28-29; (b) addressing

the second *BMW* guidepost – the "ratio to the actual harm inflicted on the plaintiff" – the Court of Appeal held that "[w]hile the compensatory award in this case was modest, in light of the reprehensible conduct attributable to National Union, the trial court properly imposed a punitive damage award sufficiently high to achieve the twin objectives of punishment and deterrence," App. 30; (c) addressing the third *BMW* guidepost – "the civil or criminal penalties that could be imposed for comparable misconduct" – the Court of Appeal held National Union was on notice it could be subject to a $1.7 million punitive damage award because "[i]t has long been common knowledge acts of bad faith by insurers could subject that party to significant punitive damage awards." App. 31. In addition, despite acknowledging that National Union's liability in this case was purely vicarious, based upon the conduct of its agent TRM, the Court of Appeal relied on a California statute which provides for a fine or imprisonment for *knowingly* assisting or conspiring with any person to conceal or fail to disclose the occurrence of an event that affects any person's right to insurance benefits. App. 31.

National Union again filed a petition for review in the Supreme Court of California. It argued (a) the Court of Appeal failed to satisfy its obligation under *Cooper*, 532 U.S. 424, to conduct a de novo review of the punitive damage award, and (b) when reviewed de novo in light of the three *BMW* guideposts, the $1.7 million punitive damage award violated National Union's federal due process rights. The Supreme Court of California denied review without comment on September 25, 2002. App. 80.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION.

In *BMW*, 517 U.S. at 574-575, this court identified three "guideposts" which courts should utilize in performing their constitutionally mandated duty to independently review a punitive damage award for excessiveness: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damage award and the civil or criminal penalties authorized or imposed in comparable cases. *See also id.* at 583. This case offers an appropriate opportunity for the court to provide needed guidance regarding proper application of the second and third guideposts.

(a) Prior decisions of this court indicate that, except in limited circumstances, punitive damages should not exceed a modest single-digit multiple of compensatory damages. Nonetheless, in practice the second guidepost plays little, if any, role in the assessment of whether a punitive damage award is constitutionally excessive – numerous post-*BMW* decisions have upheld punitive damages that substantially exceed a single-digit multiple without regard to whether the circumstances which this court held will allow a larger multiple are present. Consequently, clarification from this court is necessary if that guidepost is to function as intended: to provide fair notice of the severity of the penalty likely to be imposed for prohibited conduct and meaningful guidance for appellate review of punitive damages.

This court has granted certiorari in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 2001 Ut.

89, *cert. granted*, 70 U.S.L.W. 3741 (U.S. June 3, 2002) (No. 01-1289), to decide whether a $145 million punitive damage award that is 145 times compensatory damages violates federal due process. However, even if it reverses the Utah Supreme Court's judgment in *State Farm*, this court's decision may not provide guidance in the situation that more typically confronts lower courts on a regular basis and is presented by this case: a punitive damage award that, while nowhere near the monstrous award in *State Farm*, nonetheless substantially exceeds the single-digit multiple that prior decisions of this court have held is constitutionally permissible.

(b) As applied by the lower courts, the third *BMW* guidepost – the civil or criminal penalties authorized or imposed in comparable cases – similarly has failed to provide fair notice and a meaningful check on grossly excessive awards. Once again, this case is illustrative. In holding the $1.7 million punitive damage award was not constitutionally excessive when examined under that guidepost, the Court of Appeal stated: "It has long been common knowledge acts of bad faith by insurers could subject that party to significant punitive damage awards." App. 31. However, enormous punitive damages were precisely the problem that prompted this court to impose constitutional limitations on the size of those awards. Consequently, the Court of Appeal's reliance on those possibly unconstitutional pre-*BMW* awards to uphold the award here was circular and illogical and ignored this court's admonition to look to "legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW*, 517 U.S. at 583. Unfortunately, the Court of Appeal's opinion is not an aberration; to the contrary, post-*BMW* decisions frequently hold a punitive damage award

is not excessive under the third guidepost so long as similar awards were made in prior cases.

To provide proper guidance regarding the second and third *BMW* guideposts, we urge this court to grant certiorari and consider this case in conjunction with *State Farm*. In the alternative, we request that the court defer a decision on this petition until it has decided *State Farm*, and then reverse or remand for reconsideration in light of its decision in that case. *See, e.g.*, *Keney v. New York*, 388 U.S. 440 (1967).

II. THIS COURT SHOULD CLARIFY THE CIRCUMSTANCES, IF ANY, IN WHICH PUNITIVE DAMAGES MAY EXCEED A SINGLE-DIGIT MULTIPLE OF COMPENSATORY DAMAGES.

In *BMW*, this court noted that "perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *BMW*, 517 U.S. at 580. This guidepost, like the other two delineated in that opinion, derives from the "fair notice" concept of due process. Due process requires "adequate notice of the magnitude of the sanction" that might be imposed for prohibited conduct. *Id.* at 574. As this court's decision in *BMW* establishes, subject to limited exceptions which are not present in this case, the ratio should not exceed a modest single-digit multiple of compensatory damages.

After noting that "the principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree," *BMW*, 517 U.S. at 580, this court cited to early English statutes which "provided for double, treble, or quadruple damages," *id.* at

581, and to present-day federal statutes which provide for ratios of 1 to 1 and 2 to 1. *Id.* 581 n.33. *See, e.g.*, 15 U.S.C.A. § 15 (West 1997) (treble damages – i.e., a 2 to 1 ratio – for antitrust violations); 15 U.S.C.A. § 1117(a) (West 1998) (treble damages for trademark infringement); 18 U.S.C.A. § 1964(c) (West 2000) (treble damages for RICO violations); 35 U.S.C.A. § 284 (West 2001) (up to treble damages for patent infringement). *See also Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991) (ratio of 4 to 1 between punitive and compensatory damages was "close to the line . . . of constitutional impropriety.")[5]

Although this court "rejected the notion that the constitutional line . . . is marked by a single mathematical formula," *BMW*, 517 U.S. at 582, it nonetheless identified only a few circumstances as grounds for departure from a low multiple: (1) cases involving "low awards of compensatory damages," i.e., where "a particularly egregious act has resulted in only a small amount of economic damages"; (2) where "the injury is hard to detect"; and (3) where "the monetary value of noneconomic harm might have been

[5] Plaintiffs seeking to uphold significant ratios between punitive and compensatory damages frequently assert that in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), this court upheld a $10 million punitive damage award where compensatory damages were only $19,000, a ratio of over 526 to 1. In fact, this court looked to the ratio between the punitive award and the actual and potential harm to the plaintiff in that case. 509 U.S. at 462. The plaintiff in *TXO* contended that the potential harm was between $5 million and $8.3 million, i.e., a ratio of between 1.2 to 1 and 2 to 1. *See* 509 U.S. at 461. Although the plurality apparently agreed that the plaintiff's estimation of potential harm was exaggerated, it nonetheless concluded that "the jury could well have believed that TXO was seeking a multimillion dollar reduction in its potential royalty obligation." *Ibid.* Thus, the ratio probably was not more than 5 to 1.

difficult to determine," prompting concern that the plaintiff might not be made whole. *Ibid.*

Nonetheless, the second *BMW* guidepost has been applied in a haphazard and wholly unpredictable fashion. While some courts have treated that guidepost as a meaningful restraint of the size of punitive damages, *see, e.g., In re Exxon Valdez*, 270 F.3d 1215, 1243-44 (9th Cir. 2001) (suggesting that ratio of between 12 to 1 and 17 to 1 constitutionally excessive because it greatly exceeded the 4 to 1 ratio that *Haslip* held was "'close to the line'"), many other courts have upheld awards substantially exceeding a single-digit multiple regardless of whether any circumstance which this court held would support a larger multiple is present.[6] Consequently, in practice the second guidepost fails to provide either fair notice of the severity of punishment for prohibited conduct or a meaningful check on excessive punitive damages.

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[6] *See, e.g., Paracelsus Health Care Corp. v. Willard*, 754 So. 2d 437, 445 (Miss. 1999), *cert. denied*, 530 U.S. 1215 (2000) (upholding ratios of 150 to 1 and 43 to 1 even though court acknowledged that none of the circumstances for large multiple delineated in *BMW* was present); *Weeks v. Baker & McKenzie*, 74 Cal. Rptr. 2d 510, 534 (Ct. App. 1998) (70 to 1 ratio); *Parrott v. Carr Chevrolet, Inc.*, 965 P.2d 440, 443 (Or. Ct. App. 1998) (26 to 1 ratio); *Harris v. Soley*, 756 A.2d 499, 509 (Me. 2000) (16 to 1 ratio); *Rhyne v. K-Mart Corp.*, 562 S.E.2d 82, 94 (N.C. Ct. App. 2002) (30 to 1 and 23 to 1 ratios); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 147-48 (Iowa 1996) (500 to 1 ratio); *Life Ins. Co. of Ga. v. Johnson*, 701 So. 2d 524, 534 (Ala. 1997) (12 to 1 ratio); *Romo v. Ford Motor Co.*, 122 Cal. Rptr. 2d 139 (Ct. App. 2002) (58.8 to 1 ratio); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 468 (Idaho 1996) (26.67 to 1 ratio); *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1339 (11th Cir. 1999), *cert. denied*, 528 U.S. 931 (100 to 1 ratio).

This case is typical. The ratio between the $89,000 award on Textron's tort cause of action – the only cause of action that would support punitive damages[7] – is 20 to 1. *See Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 82 n.9 (1st Cir. 2001) ("We believe that it is appropriate to construct the ratio by looking only to the count on which punitive damages were awarded."). Indeed, even if the relevant ratio is the 10 to 1 ratio between the punitive award and the combined $165,000 tort and contract award, it still substantially exceeds the 4 to 1 ratio which this court held was "close to the line . . . of constitutional impropriety." *Haslip*, 499 U.S. at 23-24.

However, this case involves none of the circumstances which this court identified as grounds for departure from a low multiple. *See BMW*, 517 U.S. at 582: (a) The compensatory damages – whether $89,000 or $165,000 – are not small, and the act in question – the failure to pay a $61,000 property damage claim by a major finance company – was not "particularly egregious"; (b) the injury – Textron's loss of its security interest in the bus and the attorney fees it incurred to recover policy benefits – are not hard to detect; and (c) because it is a corporation, Textron is incapable of suffering noneconomic harm. Moreover, "there [was] no suggestion that [Textron] was threatened with any additional potential harm" from the conduct in this case. *BMW*, 517 U.S. at 582.

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[7] Under California law, a punitive damage award may be based only on an award of tort damages, not contract damages. *Myers Bldg. Ind., Ltd. v. Interface Tech.*, 17 Cal. Rptr. 2d 242, 248 (Ct. App. 1993).

In sum, as applied in this and similar cases, the second *BMW* guidepost fails to provide fair notice regarding the severity of the punishment likely to be imposed for prohibited conduct and meaningful guidance for appellate review of punitive damage awards. We urge the court to grant certiorari in order to provide comprehensive guidance regarding the proper application of that guidepost.

III. THE COURT OF APPEAL'S RELIANCE ON PRIOR PUNITIVE DAMAGE AWARDS TO HOLD THE $1.7 MILLION AWARD WAS NOT EXCESSIVE WHEN COMPARED TO THE CIVIL OR CRIMINAL PENALTIES THAT COULD BE IMPOSED FOR COMPARABLE MISCONDUCT RENDERS THE THIRD *BMW* GUIDEPOST MEANINGLESS.

The third *BMW* guidepost is a comparison between "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct. . . . " *BMW*, 517 U.S. at 583. This court explained that "a reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'" *Ibid.* It noted that the $2 million punitive damage award imposed on *BMW* in that case was "substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance" and *BMW* therefore did not receive "fair notice that the . . . violation . . . [of the applicable statute] might subject an offender to a multimillion dollar penalty." *Id.* at 583-84.

As National Union explained in the Court of Appeal, the $1.7 million punitive award here is excessive under

the third guidepost because the maximum statutory penalty established by the California Legislature for the conduct in issue – insurance bad faith – is $10,000. Cal. Ins. Code § 790.035 (West 1993). That statute certainly did not provide National Union with fair notice that its denial of Textron's property damage claim would subject it to a seven-figure penalty.

Nonetheless, the Court of Appeal held National Union had "'fair notice'" it could be subjected to a $1.7 million punishment, and that the award therefore was not excessive under the third *BMW* guidepost, because "[i]t has long been common knowledge acts of bad faith by insurers could subject that party to significant punitive damage awards." App. 31.

However, this court's decisions admonishing that the due process clause prohibits '"grossly excessive"' punishments on a tortfeasor, *see BMW*, 517 U.S. at 562, were a direct response to the fact that enormous punitive damage awards were being rendered and affirmed with increasing frequency. *See, e.g.*, *Haslip*, 499 U.S. at 18 ("We note once again our concern about punitive damages that 'run wild.'"). Consequently, in holding that a person is entitled to "fair notice . . . of the severity of the penalty that a state may impose," *BMW*, 517 U.S. at 574, this court directed lower courts to look to "legislative judgments concerning appropriate sanctions for the conduct at issue," *BMW*, 517 U.S. at 583, *not* the punitive damage awards imposed by juries in prior cases. Since the "significant punitive damage awards" referred to by the Court of Appeal were precisely the problem this court was seeking to rectify when it delineated its three guideposts, the Court of Appeal's reliance on those awards to justify the punitive

damage award here was circular and illogical and effectively rendered the third guidepost meaningless.

Once again, this case is not an aberration. To the contrary, in addressing the third *BMW* guidepost, the lower courts frequently point to prior punitive damage awards in the jurisdiction to conclude the defendant had "fair notice" its conduct could result in a substantial award. *See, e.g.*, *Romo*, 122 Cal. Rptr. 2d at 166 ("[d]efendant has been on notice 'for more than a century' that California regards it as necessary to impose penalties related to the wealth of the defendant in order to achieve the goals of punishment and deterrence . . . [a]nd defendant has been on notice since at least 1971 that a week's profits amounting to about 1 percent of net wealth are not excessive punitive damages" (citation omitted)); *Cont. Trend Res., Inc. v. OXY USA, Inc.*, 101 F.3d 634, 641 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 ("[p]laintiffs point to cases from other states involving very large punitive damage awards. . . . Those cases, together with cases involving large awards in Oklahoma, . . . , provided sufficient notice to OXY of the potential for large punitive awards" (citations omitted)); *Williams v. Philip Morris Inc.*, 48 P.3d 824, 842 (Ct. App. 2002) *adhered to on reconsideration by* 51 P.3d 670 (Or. Ct. App. 2002) ("[t]o the extent that the issue involves adequate notice to defendant, the established Oregon law of punitive damages . . . was sufficient to alert defendant to the possible punishment for its fraudulent scheme" (citation omitted)); *Zimmerman*, 262 F.3d at 83 ("[s]ince the Legislature provided explicit notice that the violator of one of the provisions of Chapter 151B could be liable for punitive damages several times greater than the compensatory award in the same case, the appellants were sufficiently on notice that

retaliating against the plaintiff in violation of the statute potentially could subject them to a similar level of punitive damages"); *Simon v. San Paolo U.S. Holding Co., Inc.*, No. B121917, 2001 WL 1380836 at *12 (Ct. App. 2001) ("substantial punitive damage awards have been a reality in fraud cases for many years. . . . Our consideration of the third *BMW* factor leads us to conclude that San Paolo had fair notice that intentional affirmative acts of fraud may lead to a sizeable punitive damage award" (citation omitted)); *Walston*, 923 P.2d at 468 ("In Idaho punitive damages have long been allowed, and the special relationship between an insurer and an insured has been well defined. The state has set standards of practice in the insurance industry. There is no doubt that Monumental knew, if it paid attention, that severe penalties could follow from fraud in marketing and bad faith denial of benefits practice.").

In the view of these courts, one excessive punitive damage award justifies another, and no reference to legislative determinations of appropriate penalties is needed.

In sum, as applied in this and similar cases, the third *BMW* guidepost, like the second, fails to afford the fair notice required by due process and is essentially meaningless as a check on grossly excessive punitive damages. Certiorari should be granted to clarify that when examining a punitive award under that guidepost, a court should compare the award with the legislative penalties that

realistically might be imposed in comparative cases, not the punitive damages awarded in prior cases.[8]

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[8] The Court of Appeal also suggested the $1.7 million punitive damage award was not excessive under the third *BMW* guidepost because a California statute, Cal. Penal Code § 550(a)(10)(b) (West 1999), makes it a felony subject to fine or imprisonment to "knowingly assist or conspire with any person" to conceal or fail to disclose the occurrence of an event that affects any person's right to insurance benefits. App. 31. However, because the Court of Appeal acknowledged that National Union's liability was vicarious, based on its agent's wrongdoing, and that National Union's own fault was limited to its "self-imposed ignorance" of its agent's conduct, App. 29, it is wholly unreasonable to assume that any National Union officer could have been imprisoned under a statute which punishes "knowing" participation in the prohibited conduct.

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, the petition should be granted, the judgment of the Court of Appeal vacated, and the case remanded for further consideration in light of this court's decision in *State Farm*, No. 01-1289.

Respectfully submitted,

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TEXTRON FINANCIAL CORPORATION, Plaintiff and Appellant, v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, et al., Defendants and Appellants.	G020323 (Super Ct. No. 734096) OPINION (Filed Jun. 28, 2002)

Appeals from a judgment and postjudgment orders of the Superior Court of Orange County, Nancy Wieben Stock and Raymond J. Ikola, Judges. Judgment and postjudgment orders affirmed.

Albert, Weiland & Golden, Marcus M. Kaufman; Stephan, Oringher, Richman & Theodora and Robert M. Dato for Plaintiff and Appellant.

Horvitz & Levy, Michell C. Tilner, Peter Abrahams; Lewis D'Amato, Brisbois & Bisgaard, R. Gaylord Smith and Michael W. Connally for Defendants and Appellants.

* * *

Plaintiff Textron Financial Corporation sued defendant National Union Fire Insurance Company of Pittsburgh, Pennsylvania (National Union) and others over its refusal to honor a claim for insurance benefits concerning property damage to a commercial bus in which plaintiff held a security interest. Plaintiff settled with two parties and proceeded to trial against National Union and American International Adjustment Company, Inc. (AIAC), National Union's claims adjuster. After a trial divided into three phases, the trial court entered judgment on a jury's special verdict awarding plaintiff $165,414.40 in compensatory damages and $10 million in punitive damages against National Union. The court entered judgment, including costs, for AIAC against plaintiff.

Both plaintiff and National Union filed postjudgment motions. The trial court denied National Union's motion for judgment notwithstanding the verdict and plaintiff's motion for a new trial, but conditionally granted National Union a new trial unless plaintiff agreed to reduce the punitive damage award to $1.7 million. Plaintiff agreed to the remittitur. The court also struck plaintiff's request for expert witness fees.

Both plaintiff and National Union appealed from the judgment and postjudgment orders. Plaintiff challenged the trial court's striking of its cause of action for unfair business practices, the judgment in favor of AIAC, including costs, the remittitur of punitive damages, and the denial of its request for expert witness fees. National Union attacked the punitive damage award on several grounds, and the trial court's refusal to offset the amounts plaintiff received in the pre-trial settlements.

In an unpublished opinion filed January 29, 2001, we affirmed the judgment and postjudgment orders in their entirety. National Union filed a petition for writ of certiorari with the United States Supreme Court. On October 9, the Supreme Court issued an order granting the writ, vacated our judgment and remanded the matter to us for further consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424. We granted the parties the opportunity to file supplemental briefs on the issue of whether the punitive damage award violates federal due process when reviewed under a de novo standard of review.

Having reviewed the matter in accordance with the United States Supreme Court's direction, we again affirm the trial court's judgment and postjudgment orders in their entirety.

FACTS

Il Sung Ko operated a tour bus company, Taeguk Tour and Sightseeing (Taeguk). Plaintiff loaned Ko funds to purchase a bus, receiving in return a security interest in the vehicle. The security agreement required Ko to insure the bus. Ko obtained a National Union liability insurance policy through D.W. Ferguson & Associates, Inc. (Ferguson), an independent insurance brokerage. The policy was issued through TRM International, Inc. (TRM), a company appointed by National Union to solicit, bind, write, and administer policies for its commercial bus program. The policy listed plaintiff as a loss payee and required National Union to mail plaintiff notice in advance if it cancelled the policy.

Taeguk suffered a downturn in business and Ko failed to timely pay his insurance premiums. In October 1992, TRM sent Ko notice it intended to cancel the policy. TRM did not send a copy of the cancellation notice to plaintiff. The policy terminated November 27.

Beginning in late October and throughout November, Ferguson and Taeguk discussed reducing the insurance premiums by deleting coverage for some of Ko's vehicles. Ferguson also corresponded with a TRM underwriter about the situation, proposing the issuance of a new policy covering only some of Ko's busses. The underwriter suggested an alternative whereby TRM would reinstate the original policy and give Ko a credit against his policy's premium if he agreed to certain conditions, which included delivering the license plates of two buses to Ferguson and temporarily suspending use of those vehicles. Plaintiff presented expert testimony that, unlike a transaction where a vehicle is deleted from a policy, the alternative approach implemented a procedure described as lay-up credit. Under a lay-up credit, the insured maintains coverage on a vehicle while it is not being operated.

Ko agreed to this proposal, and on December 1, TRM retroactively reinstated the policy effective November 27. The bus encumbered by plaintiff's security interest was one of the vehicles Ko intended not to use. Plaintiff did not receive notice of the policy reinstatement with the endorsement which reflected Ko's business received a premium credit due to the vehicle's non-use. National Union claimed it sent a copy of this endorsement to plaintiff, but plaintiff denied receiving it.

In January 1993, the bus encumbered by plaintiff's lien suffered extensive damage when it collided with

another vehicle on a public highway. At Taeguk's request, Ferguson submitted a notice of claim to AIAC. On February 4, TRM sent AIAC a notice verifying coverage for the vehicle and confirming plaintiff as a loss payee. However, after further correspondence with Taeguk and TRM, AIAC denied the claim, asserting the bus had been deleted from the policy before the accident. TRM prepared an endorsement deleting the bus from the policy (Number 8) on February 16. This endorsement purported to be effective as of December 1, 1992.

In late 1993, Ko defaulted on plaintiff's loan. Plaintiff then learned about the accident and contacted Ferguson concerning insurance benefits to repair the vehicle. Ferguson informed plaintiff the bus had been removed from the policy before the accident. Plaintiff sued Ko, recovering a judgment against him and incurring $3,859.50 in legal fees in the process. However, Ko filed bankruptcy and discharged the debt.

Plaintiff submitted a claim to National Union for benefits under the insurance policy. At that time, it possessed only a certificate of insurance, not a copy of the policy.

AIAC also handled plaintiff's claim. TRM informed AIAC the encumbered bus had been deleted from the policy before the accident and sent it a copy of endorsement Number 8. A certificate of mailing on that copy covered the part of the endorsement reflecting the date TRM had prepared it. After an AIAC claims manager discussed the matter with John Lavin, a senior underwriter with the division handling National Union's bus program, and Tom Spangenberg, TRM's president, AIAC advised plaintiff the claim was being denied. The basis of

the denial was that Ko deleted the bus from the policy before the accident, and TRM and AIAC concluded National Union's policy did not obligate it to give plaintiff advance notice of the deletion. National Union did not send plaintiff a copy of the policy until August 1994. Again, the mailing certificate covered the portion of endorsement Number 8 displaying the date on which it had been prepared.

PROCEDURAL BACKGROUND

The trial's first phase dealt with plaintiff's breach of contract claim against National Union. The court found, as a matter of law, the insurance contract's loss-payable clause constituted a separate agreement between plaintiff and National Union, obligating National Union to provide 30 days' notice of the policy's cancellation or the bus's deletion from it, and that National Union failed to comply with this requirement. The jury subsequently awarded plaintiff $61,513.80 under the policy.

The second phase involved plaintiff's causes of action for bad faith against National Union and fraud against both National Union and AIAC. The jury returned a special verdict finding National Union violated the policy's implied covenant of good faith and fair dealing and that it acted with oppression, malice, and fraud in doing so. The jury also returned a special verdict finding National Union liable for intentional misrepresentation and concealment and awarded plaintiff $3,859.80 in damages. Based on its interpretation of the jury's answers in the special verdict, the trial court entered judgment for AIAC on the fraud count.

During this phase, the trial court also ruled plaintiff could recover $30,268.16 in attorney fees as damages under *Brandt v. Superior Court* (1985) 37 Cal.3d 813. The parties stipulated plaintiff was entitled to $55,616.34 in costs pursuant to *Brandt*. Subsequently, the court denied National Union's request to offset the pretrial settlements plaintiff received from Ferguson ($26,500) and TRM ($62,500) against the compensatory award imposed on it.

The trial's third phase dealt with punitive damages. The jury awarded $10 million in punitive damages against National Union which the trial court subsequently reduced to $1.7 million. In addition, the judgment awarded plaintiff compensatory damages, consisting of the policy benefits plus interest, the legal expenses recoverable under *Brandt v. Superior Court, supra,* 37 Cal.3d 813, and the damages for fraud. Finally, the court awarded AIAC $10,277.52 in costs against plaintiff.

DISCUSSION

PLAINTIFF'S APPEAL

Demurrer to the Unfair Business Practices Cause of Action

The complaint's fourth count sought injunctive and restitutionary relief under Business and Professions Code section 17200 et seq. against National Union and AIAC for "engag[ing] in unfair competition" in the "handling [of plaintiff's] claim, and the claims of other persons." Plaintiff alleged National Union, "aided and abetted" by AIAC, "used misleading documents to falsely suggest that it would provide insurance . . . where it had no intention to do so," "falsely suggested that it would . . . provid[e] timely notice of [policy] cancellations," "misrepresented the terms and meaning of its policies . . . to provide a pretext for its

refusal to provide timely notice," and "engaged in a pattern and practice of wrongful and false cancellations of insurance policies. . . . "

Relying on *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, National Union and AIAC generally demurred to this count. The trial court sustained the demurrers without leave to amend. Citing *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, plaintiff contends the trial court's ruling was erroneous.

Moradi-Shalal held the Unfair Insurance Practices Act (Ins. Code, § 790 et seq.; UIPA) does not create a private cause of action against insurers who violate its provisions. (*Moradi-Shalal v. Fireman's Fund Ins. Companies, supra,* 46 Cal.3d at pp. 304-305.) This rule applies to both first party and third party claims. (*Maler v. Superior Court* (1990) 220 Cal.App.3d 1592, 1597-1598; *Zephyr Park v. Superior Court* (1989) 213 Cal.App.3d 833, 836-838.) While insurance companies are subject to California laws generally applicable to other businesses, including laws governing unfair business practices (Ins. Code, § 1861.03, subd. (a)), parties cannot plead around *Moradi-Shalal's* holding by merely relabeling their cause of action as one for unfair competition. (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 283-284; *Maler v. Superior Court, supra,* 220 Cal.App.3d at p. 1598; *Safeco Ins. Co. v. Superior Court* (1990) 216 Cal.App.3d 1491, 1494.)

The specific allegations of wrongful conduct contained in plaintiff's fourth cause of action, using misleading documents and misrepresenting both the terms of the insurance policies and its obligations under them for its

own benefit, are the type of activities covered by the UIPA. (Ins. Code, § 790.03, subds. (a) & (h) .) In *Safeco Ins. Co. v. Superior Court, supra,* 216 Cal.App.3d 1491, the court ordered dismissal of an action which included a request for injunctive relief under Business and Professions Code section 17200 et seq. based on an insurer's allegedly unfair claims settlement practices. (*Id.* at pp. 1493-1494.) "Though the issue is one of first impression, we have no difficulty in deciding the Business and Professions Code provides no toehold for scaling the barrier of *Moradi-Shalal*. . . . To permit plaintiff to maintain this action would render *Moradi-Shalal* meaningless." (*Id.* at p. 1494.) Under the foregoing cases, merely alleging these purported acts constitute unfair business practices under the unfair competition law is insufficient to overcome *Moradi-Shalal.*

In a few cases, the Supreme Court has allowed an action against an insurance company under the unfair competition law where the alleged conduct constituted an unlawful restraint on trade under the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.), even though it also violated the UIPA. (*Quelimane Co. v. Stewart Title Guarantee Co.* (1998) 19 Cal.4th 26, 43-44; *Manufacturers Life Ins. Co. v. Superior Court, supra,* 10 Cal.4th at pp. 283-284.) "This conclusion does not compromise the rule of *Moradi-Shalal* in any way. The court concluded there that the Legislature did not intend to create new causes of action when it described unlawful insurance business practices in section 790.03, and therefore that section did not create a private cause of action under the UIPA. The court did not hold that by identifying practices that are unlawful in the insurance industry, practices that violate the Cartwright Act, the Legislature intended to bar

Cartwright Act causes of action based on those practices." (*Manufacturers Life Ins. Co. v. Superior Court, supra,* 10 Cal.4th at p. 284.)

The case on which plaintiff relies, *State Farm Fire & Casualty Co. v. Superior Court, supra,* 45 Cal.App.4th 1093, held the plaintiff-insureds had sufficiently alleged a cause of action against their insurer under the unfair competition law based on allegations of conduct constituting common law fraud and breach of the implied covenant of good faith and fair dealing, even though the same conduct violated the UIPA. "While *Moradi-Shalal* clearly held that the Legislature did not intend to create new causes of action when it enacted section 790.03, it is also clear that the Legislature did not intend in any way to circumscribe the previously existing common law right of an insured to seek redress for an insurer's fraudulent deception or breach of the covenant of good faith implied in the policy. . . . Thus, . . . common law claims remain as a firm legal basis on which an insured may rely to seek redress against an insurer." (*Id.* at pp. 1107-1108.)

The persuasiveness of *State Farm* has been undercut by the Supreme Court's subsequent disapproval of its definition of "unfair" business practices. Quoting from *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, *State Farm* declared: "The test of whether a business practice is unfair 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim. . . . [Citations.]'. . . . [A]n 'unfair' business practice occurs when that practice 'offends an established public policy or when the practice is

immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' [Citation.]" (*State Farm Fire & Casualty Co. v. Superior Court, supra,* 45 Cal.App.4th at pp. 1103-1104, fn. omitted.)

In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, the Supreme Court found this definition is "too amorphous and provid[es] too little guidance to courts and businesses." (*Id.* at pp. 184-185.) While *Cel-Tech Communications* limited its discussion to the context of an action between competitors, the court concluded, "any finding of unfairness to competitors under section 17200 be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition," and that under Business and Professions Code section 17200, "the word 'unfair' . . . means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law. . . . " (*Id.* at pp. 186-187, fn. omitted; see also *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1165-1167 [applying *Cel-Tech Communications, Inc.'s* standard in vehicle lessee's action against rental agency for allegedly concealing or obscuring the rental agreement's fuel service charge].)

Harmonizing *Moradi-Shalal's* holding with the foregoing decisions supports a conclusion the trial court properly sustained the demurrers to plaintiff's unfair competition claim. First, the holding in *Safeco Ins. Co. v. Superior Court, supra,* 216 Cal.App.3d 1491 supports this result. Second, this case is distinguishable from *Quelimane* and *Manufacturers Life* in two respects. Neither decision involved an action by an insured or a third party based on the insurer's alleged failure to comply with a policy or to

provide benefits. In *Quelimane,* parties who acquired real estate at tax sales sued title insurance companies for refusing to issue policies on their property. *Manufacturers Life* concerned an insurance agency's action against insurance companies for boycotting the agency. Also, in both cases the plaintiff alleged a Cartwright Act violation as the basis for its unfair competition cause of action. Finally, given the Supreme Court's disapproval of *State Farm's* "amorphous" definition of "unfair" practices and its focus on legislatively declared public policy, reliance on general common law principles to support a cause of action for unfair competition is unavailing.

Under these circumstances, the trial court properly found plaintiff failed to state a cause of action against National Union and AIAC for unfair business practices.

The Jury's Phase Two Findings

During the second phase, the jury returned a special verdict containing findings on the elements of two theories of deceit, intentional misrepresentation and concealment of a material fact. The jury's responses reflect it found both National Union and AIAC made representations of a material fact on which plaintiff justifiably relied to its injury and that both defendants made the representations "recklessly without knowing whether [they were] true or false." However, the jury concluded AIAC did not know the representations were false and did not make them with the intent to defraud plaintiff. On the concealment theory, the jury found both defendants concealed or suppressed a material fact which resulted in injury to plaintiff, but also found AIAC did not intentionally conceal or suppress a material fact with the intent to defraud plaintiff. In

addition, the jury concluded both defendants were "guilty of fraud, malice, or oppression in the conduct upon which [it] based [its] finding of liability. . . . "

When the jury returned its special verdict, the court discussed the inconsistency in the findings with counsel and ultimately ruled AIAC "is not liable for fraud or concealment." Plaintiff argues the trial court erred by construing the jury's findings to exonerate AIAC.

The distinction between a general and special verdict is that under the former a jury "pronounce[s] generally upon all or any of the issues," while the latter is one "by which the jury find the facts only, leaving the judgment to the court." (Code Civ. Proc., § 624.) In a case "[w]here a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." (Code Civ. Proc., § 625; see also *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1156-1157; *Bond v. DeWitt* (1954) 126 Cal.App.2d 540, 544.)

The jury's findings that AIAC made representations recklessly but without knowing the statements were false are inherently inconsistent. A representation made recklessly without knowledge of its falsity is sufficient to establish scienter. (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 705, p. 806.) However, on both fraud theories the jury found AIAC did not act with an intent to defraud plaintiff. An intent to induce reliance on a misrepresentation or nondisclosure by the plaintiff is essential to establish liability for either an intentional misrepresentation or concealment of a material fact. (*Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 93; *Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 157; 5 Witkin, Summary of Cal. Law, *supra,* §§ 706, 710, pp. 807, 810.) The

absence of this element defeats plaintiff's fraud claim against AIAC. Furthermore, the finding relevant to defendants' punitive damages liability was in the nature of a general verdict and is subordinate to the jury's specific finding of no intent to defraud. Thus, the trial court properly entered judgment for AIAC on the fraud claim.

Plaintiff contends AIAC could be found liable either as a co-conspirator of National Union or on a theory of negligent misrepresentation. These contentions are without merit.

First, since plaintiff did not assert the latter theory at trial, and the court did not instruct the jury on it, it is now too late to do so. (*Overgaard v. Johnson* (1977) 68 Cal.App.3d 821, 826.) Second, while the court did instruct the jury on conspiracy as a basis for imposing liability, as plaintiff concedes the jury was not asked to return a special verdict on this allegation. Had the jury concluded AIAC was liable as a co-conspirator with National Union, it should have returned a finding of an intent to defraud.

A review of plaintiff's closing argument also reflects it relied on the representations and conduct of AIAC's employees, not conspiracy, to support its fraud claim. In fact, while discussing the question of whether National Union acted with malice, plaintiff's counsel suggested no conspiracy existed. "An insurance company whose job is to . . . investigate the situation thoroughly, concealing information which it knows is going to lead to a discovery that there's coverage – even concealing that information from its own claims people so that they won't have a guilty conscience about denying the claim – that's malice."

The trial court properly entered judgment for AIAC on the fraud claim.

The Brandt Damage Award

Plaintiff retained legal counsel under an agreement requiring it to pay counsel 40 percent of all amounts recovered in the case. After a lengthy discussion, the trial court limited the sum plaintiff could recover as damages under *Brandt v. Superior Court, supra,* 37 Cal.3d 813, to 40 percent of the amount recovered as policy benefits during the trial's first phase. Plaintiff attacks this ruling and claims it should have been allowed to recover the reasonable value of counsel's services which it calculates is nearly $300,000 greater than the amount awarded by trial court. This contention lacks merit.

Brandt held attorney fees reasonably incurred to compel payment of policy benefits tortiously withheld by an insurer are recoverable as an element of damages. (*Brandt v. Superior Court, supra,* 37 Cal.3d at pp. 815, 817.) "When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss – damages – proximately caused by the tort. [Citation.]" (*Id.* at p. 817.)

The retainer agreement required plaintiff to pay counsel 40 percent of all sums recovered in this action. It had no further legal obligation to pay counsel for the legal services rendered to it. *Brandt* expressly held the "fees recoverable . . . may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract." (*Brandt v. Superior Court, supra,* 37 Cal.3d at p. 819.) Plaintiff cites no authority permitting a post-trial modification of the retainer agreement. Thus, the trial court did not err by limiting the

damage award under *Brandt v. Superior Court, supra,* 37 Cal.3d at p. 813 to the percentage specified in the parties' contingency agreement.

The Costs Award

Plaintiff attacks the trial court's postjudgment rulings concerning the award of costs on two grounds. Both arguments lack merit.

First, it disputes the court's finding AIAC was a prevailing party. Plaintiff argues that since National Union and AIAC filed a joint answer to the complaint and were represented by the same counsel during trial, they held a unity of interest which precludes AIAC from acquiring this status.

Code of Civil Procedure section 1032 defines prevailing party to include "a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. . . . [I]n situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides. . . . " (Code Civ. Proc., § 1032, subd. (a)(4).) In conformity with this statute, the case law holds that where only one of multiple, jointly-represented defendants presenting a unified defense prevails in an action, the trial court has discretion to award or deny costs to that party. (*Webber v. Inland Empire Investments, Inc.* (1999) 74 Cal.App.4th 884, 920; *Slavin v. Fink* (1994) 25 Cal.App.4th 722,

725-726; *Smith v. Circle P Ranch Co.* (1978) 87 Cal.App.3d 267, 272.)

Plaintiff asserts the trial court did not exercise its discretion in this case, citing a statement by the trial judge during the hearing on the motion to strike AIAC's cost bill. However, the court made that comment in response to plaintiff's contention "no evidence" exists "to support any particular allocation" between AIAC and National Union, and that the latter entity presumably "fronted" AIAC's trial expenses. The record as a whole does not support a conclusion the trial court failed to exercise its discretion concerning AIAC's status and its recovery of costs.

The related arguments also fail. Contrary to plaintiff's assertion this is not a case where it established wrongdoing against AIAC, but simply failed to recover a monetary award. The jury found AIAC did not commit fraud. Furthermore, since the injunctive relief claim had been previously dismissed, this was an action for damages. Thus, the evidence indicating AIAC subsequently modified its operating procedures concerning claims handling does not preclude it from being deemed a prevailing party.

Second, plaintiff contends the trial court erred by denying its recovery of expert witness fees under Code of Civil Procedure section 998. Nearly a year before trial, plaintiff served on National Union and AIAC an unsuccessful pretrial offer to compromise proposing "to allow judgment be taken . . . against defendants" for $626,489.26. In denying plaintiff's request for expert witness fees, the court cited *Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579.

Code of Civil Procedure section 998, subdivision (d) authorizes the court to award a prevailing plaintiff its

expert witness fees if the plaintiff made timely pretrial offer to compromise which the defendant does not accept, and "the defendant fails to obtain a more favorable judgment. . . . " In *Taing,* the court reversed an award of costs, declaring "if a plaintiff elects to submit a section 998 offer in cases involving multiple defendants, the offer to any defendant against whom the plaintiff seeks to extract penalties for nonacceptance must be sufficiently specific to permit that individual defendant to determine the exact amount plaintiff is seeking from him or her." (*Taing v. Johnson Scaffolding Co., supra,* 9 Cal.App.4th at p. 586.) *Taing* explained its rule as follows: "[A]n unapportioned offer by a single plaintiff to multiple defendants . . . requires any defendant who wants to accept to obtain the concurrence of his or her codefendants. This places a reasonable defendant at the mercy of codefendants whose refusal to settle may be unreasonable." (*Id.* at p. 585.)

National Union and AIAC were not jointly and severally liable to plaintiff. (Cf. *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1996) 50 Cal.App.4th 1542, 1547-1549.) The complaint sought recovery against National Union on theories of breach of contract, bad faith, and fraud. AIAC was alleged to be liable only on the latter theory. Furthermore, the evidence relating to each defendant's liability for fraud was separate. Thus, the trial court did not err by exercising its discretion to deny recovery of expert witness fees in this case.

NATIONAL UNION'S APPEAL

Denial of an Offset

National Union moved to have the settlement amounts plaintiff received from Ferguson and TRM offset

against the damages plaintiff recovered from it. The trial court issued a lengthy written order denying the request as to both the contractual damages and the tort damages recovered by plaintiff. National Union contends the trial court erred by denying an offset in this case.

Consistent with the general rule imposing on a party the burden of proving the existence or nonexistence of each fact essential to a claim or defense (Evid. Code, § 500), "[a] defendant seeking an offset against a money judgment has the burden of proving the offset. [Citation.]" (*Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 444.)

With respect to plaintiff's contractual recovery, an insured is entitled to receive compensation in accordance with the policy terms, and an insurer cannot reduce the amount recoverable "merely because [the insured] has 'collateral contracts or relations with third persons which relieve him wholly or partly from the loss against which the insurance company agreed to indemnify him.' [Citations.]" (*Strickland v. Federal Ins. Co.* (1988) 200 Cal.App.3d 792, 801, quoting *Hughes v. Potomac Ins. Co.* (1962) 199 Cal.App.2d 239, 251, disapproved on another ground in *Sabella v. Wisler* (1963) 59 Cal.2d 21, 34.) An insurer's right to recoup payment of policy benefits is covered by the principle of subrogation. To qualify for subrogation, the insurer must pay the insured's loss. (*Sapiano v. Williamsburg Nat. Ins. Co.* (1994) 28 Cal.App.4th 533, 538; *Chase v. National Indemnity Co.* (1954) 129 Cal.App.2d 853, 861-862.)

National Union refused to pay any policy benefits to plaintiff. The cases on which it relies to establish an offset against the contract damages involve an insured's recovery of tort damages and whether the collateral source rule

applied. Its contention the trial court "misread" *Kardly v. State Farm Mut. Auto. Ins. Co.* (1989) 207 Cal.App.3d 479 is incorrect. Contrary to National Union's claim, *Kardly* did not hold the insurer waives the right of subrogation by breaching the insurance contract. The part of the *Kardly* opinion National Union quotes refers to the facts of another appellate decision. (*Id.* at p. 489.) Thus, the trial court properly refused to offset the Ferguson and TRM settlements against the contractual damage award.

As for plaintiff's recovery of tort damages, the trial court agreed the collateral source doctrine did not apply because Ferguson and TRM could not be deemed collateral sources under the facts of this case. However, the court detailed the potential liability facing Ferguson and TRM, and found their potential liability exceeded $261,000 which included nonduplicative exposure exceeding $96,000. Applying the tort of another doctrine, the court concluded the settlement sums paid by Ferguson and TRM should not be offset against plaintiff's recovery from National Union.

Generally, a party cannot obtain double recovery for the same wrong where joint or concurrent tortfeasors are jointly and severally liable for the same wrong. (6 Witkin, Summary of Cal. Law, *supra,* Torts, § 1322, at p. 779.) "[I]t has long been recognized that if one tortfeasor pays partial compensation to the plaintiff, the liability of other tortfeasors will be correspondingly reduced: ' . . . payments by one tortfeasor on account of a harm for which he and another are each liable, diminish the amount of the claim against the other whether or not it was so agreed at the time of payment and whether the payment was made before or after judgment. Since the plaintiff can have but one satisfaction, evidence of such payments is admissible for

the purpose of reducing pro tanto the amount of the damages he may be entitled to recover.' [Citations.]" (*Krusi v. Bear, Stearns & Co.* (1983) 144 Cal.App.3d 664, 673.)

Where tortious acts by separate persons produce the same indivisible injury, each person is liable for the whole loss even if they did not act in concert. (*Sanchez v. Bay General Hospital* (1981) 116 Cal.App.3d 776, 796.) Thus, while plaintiff sued National Union for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud, but only sought damages against Ferguson and TRM for negligence, the injury it suffered was the same.

However, the court did find the tort of another doctrine applicable to this case. "A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred. [Citations.]" (*Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618, 620.)

Generally, a party seeking to recover litigation costs under this rule must plead and prove the claim. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 869, fn. 4.) While plaintiff did not do so here, the potential for its recovery of damages from Ferguson and TRM was made known to them during pretrial discovery. Furthermore, had it not settled with Ferguson and TRM, plaintiff could have amended the complaint to assert its right to recover the fees and expenses incurred in its action against National Union.

The record supports the trial court's denial of National Union's request for an offset.

PUNITIVE DAMAGES

Introduction

Both parties attack the punitive damage award. National Union challenges the sufficiency of the evidence supporting the recovery of exemplary damages, the court's refusal to instruct the jury National Union could only be subject to punitive damages based on its own employees' conduct, and the constitutionality of the award imposed on it. Plaintiff contends the trial court erred by reducing the punitive damage award to $1.7 million.

Sufficiency of the Evidence

National Union claims its own conduct was not oppressive, fraudulent, or malicious, TRM's activity cannot be attributed to it, and it did not ratify TRM's actions.

Civil Code section 3294 authorizes the award of punitive damages in any "action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. . . . " (Civ. Code, § 3294, subd. (a).) In *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, the Supreme Court upheld an award of punitive damages against an insurer based on evidence two employees, a claims manager and a claims adjuster, failed to adequately investigate the insured's claims under a disability insurance policy. "The determination whether employees act in a managerial capacity, however, does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy. When employees dispose of insureds' claims with little if any supervision, they possess

sufficient discretion for the law to impute their actions concerning those claims to the corporation." (*Id.* at pp. 822-823.)

Subsequently, the Legislature amended Civil Code section 3294 to provide, "[a]n employer shall not be liable for [punitive] damages . . . based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Civ.Code, § 3294, subd. (b).)

In *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, the Supreme Court considered the effect of this amendment in an action for wrongful termination. A manager who was responsible for eight stores, covering sixty-five employees, had fired the plaintiff, a convenience store employee. The jury awarded plaintiff both compensatory and punitive damages.

In affirming, the Supreme Court concluded that "in amending section 3294, the Legislature intended (like *Egan, supra,* 24 Cal.3d at p. 823) to limit corporate punitive damage liability to those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy." (*White v. Ultramar, Inc., supra,* 21 Cal.4th at p. 573.) The

court noted "section 3294, subdivision (b), placed ['managing agent'] next to the terms 'officer' and 'director,' intending that a managing agent be more than a mere supervisory employee. The managing agent must be someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy. Thus, by selecting the term 'managing agent,' and placing it in the same category as 'officer' and 'director,' the Legislature intended to limit the class of employees whose exercise of discretion could result in a corporate employer's liability for punitive damages." (*Ibid.*) The critical factor "'" . . . is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy." [Citation.]'" (*Id.* at p. 573.)

The agency agreement between National Union and TRM and the evidence in this case shows TRM had broad discretion over National Union's bus insurance program. TRM could "solicit, bind, write and administer insurance" policies, and "exercise [its] independent judgment as to the time, place and manner of soliciting insurance and servicing policyholders." There was evidence AIAC directed its employees to contact TRM when seeking coverage verification. In this case, TRM participated in issuing the policy to Ko, in subsequently canceling it, and then reinstating a modified version of it. Later, when Ko submitted a claim on the bus, TRM initially issued a coverage determination, but then prepared an endorsement deleting the vehicle from the policy, and advised AIAC to deny the claim. Furthermore, TRM's president was in contact with both AIAC and the senior management of the division handling National Union's bus program when plaintiff's claim was being considered, and participated in the ultimate decision to deny it. This evidence supports the jury's conclusion

TRM was National Union's managing agent, thereby subjecting it to punitive damages under Civil Code section 3294. (*White v. Ultramar, Inc., supra,* 21 Cal.4th at p. 577; *Egan v. Mutual of Omaha Ins. Co., supra,* 24 Cal.3d at p. 823.)

In light of this conclusion it is unnecessary to consider National Union's additional claims concerning instructional error and alleged insufficiency of the evidence based on its own conduct.

Validity of the Trial Court's Remittitur

The trial court issued a post-judgment order conditionally granting National Union a new trial on the insurance bad faith and fraud counts and on plaintiff's right to receive punitive damages unless the latter agreed to reduce the punitive damage award to $1.7 million. Plaintiff timely consented to the remittitur. After National Union filed its appeal, plaintiff cross-appealed and now challenges the remittitur's validity.

A trial court has the discretion to conditionally grant a new trial unless the plaintiff consents to a reduction of a damages award where the court independently determines the jury's award is excessive. (Code Civ. Proc., § 662.5, subd. (b); *Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 452-453; *West v. Johnson & Johnson Products, Inc.* (1985) 174 Cal.App.3d 831, 876.) Reversal of the ruling is allowed only where there is no substantial basis in the record to support the reasons articulated by the trial court for its decision. (Code Civ. Proc., § 657; *Jahn v. Brickey* (1985) 168 Cal.App.3d 399, 408.)

The court noted the ratio of the original punitive damage award to compensatory damages (60 to 1) created a presumption the jury's verdict was the result of passion and prejudice. (*Rosener v. Sears, Roebuck & Co.* (1980) 110 Cal.App.3d 740, 752.) Plaintiff focuses much its argument on the reprehensible nature of National Union's conduct. While the court agreed the evidence supported the jury's conclusion National Union had acted reprehensibly, it concluded the jury had placed too much emphasis on National Union's financial wealth and failed to adequately consider the relationship between the injury suffered by plaintiff and the amount of the punitive damage award. The court noted this lawsuit involves an action by one corporate entity against another corporate entity to recover only for economic loss, the value of plaintiff's security interest in a damaged bus. Given these circumstances, the trial court noted upholding the original award raised serious constitutional concerns.

Plaintiff also challenges the portion of the remittitur order requiring it to choose between a reduction in punitive damages and a new trial on *both* liability and the amount of punitive damages. In so ruling, the trial court cited *Medo v. Superior Court* (1988) 205 Cal.App.3d 64. Plaintiff relies on *Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771 in challenging the trial court's ruling.

Torres held Civil Code section 3295, subdivision (d) did not require an *appellate* court which reverses an excessive punitive damage award to order a new trial on all issues, including liability and the amount of compensatory damages. (*Id.* at pp. 777-781.) In so ruling, *Torres* distinguished *Medo*. (*Id.* at p. 780.) In *Medo*, the *trial* court ordered a new trial on all issues when the jury was

discharged after completion of the liability phase. While agreeing with the plaintiffs' assertion that the defendants had waived their right to have the same jury determine both liability and the right to punitive damages, the appellate court nonetheless noted, "[p]unitive damages are not simply recoverable in the abstract. They must be tied to oppression, fraud or malice *in the conduct which gave rise to liability in the case.* Thus . . . , the instruction on punitive damages[ ] tells the jury that in arriving at an award of punitive damages, it is to consider the reprehensibility of the conduct of the defendant and that the punitive damages must bear a reasonable relation to the actual damages. In order for a jury to evaluate the oppression, fraud or malice in the conduct giving rise to liability in the case, it must consider the conduct giving rise to liability." (*Medo v. Superior Court, supra,* 205 Cal.App.3d at p. 68.)

However, even assuming the trial court erred by relying on *Medo* to order a new trial on all issues if plaintiff refused to accept a reduction in the punitive damage award, the ruling does not require reversal. As the trial judge concluded, the jury's $10 million punitive damage award was clearly constitutionally suspect. Thus, ordering a remittitur in this case was appropriate under the circumstances.

Validity of the Award

Finally, National Union contends even the $1.7 million punitive damage award is unconstitutional and excessive. In our original opinion, we upheld the award under a deferential standard of review. The United States Supreme Court vacated the original judgment and

directed us to review the punitive damage award's constitutional validity under the independent review standard enunciated in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra,* 532 U.S. 424.

The Supreme Court has declared, "the broad discretion" possessed by the states "with respect to the imposition of . . . punitive damages," is limited by the Constitution's Due Process Clause which "prohibits the States from imposing 'grossly excessive' punishments on tortfeasors . . . [citations]." (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra,* 532 U.S. at pp. 433-434.) In determining whether the punitive damage award in a particular case is "'grossly disproportional' to the gravity of [defendants'] offense[s]'" (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra,* 532 U.S. at p. 434), a reviewing court must consider "[t]hree guideposts": "[T]he degree of reprehensibility [of the wrongdoer's conduct]; the disparity between the harm or potential harm suffered . . . and [the] punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 574-575; see also *Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra,* 532 U.S. at p. 435.) On appeal, a reviewing court considering a constitutional challenge to a punitive damage award must conduct a "thorough, independent review" of the award. (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra,* 532 U.S. at p. 441.)

The bulk of National Union's argument focuses on the reprehensibility factor. The evidence clearly reflects reprehensible conduct occurred in this case. To the extent National Union suggests Textron was not subjected to any oppression, fraud, or malice, *Cooper Industries* recognizes

that, in making an independent determination on the constitutionality of a punitive damage award, an appellate court "should defer to the [trial court's] findings of fact unless they are clearly erroneous. [Citation.]" (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra,* 532 U.S. at p. 440, fn. 14.) Here, the evidence supports the jury and trial court's finding of the predicate fact required for imposing exemplary damages.

National Union argues TRM, not it, committed the wrongdoing and its liability for TRM's actions is merely vicarious. But as discussed above, TRM "exercise[d] substantial discretionary authority over decisions . . . ultimately determin[ing] corporate policy" for the bus insurance program (*White v. Ultramar, Inc., supra,* 21 Cal.4th at p. 573), and thus constituted National Union's managing agent. Simply describing National Union's liability as vicarious does not militate against imposing a proportionately appropriate punitive damage award against it based on TRM's wrongdoing.

National Union also claims that "at most [it] failed to properly investigate TRM's conduct, and was not itself involved in the scheme to manufacture documents to conceal the existence of coverage." We reject the proposition that, to limit or avoid liability for exemplary damages, a principal may rely on its own self-imposed ignorance of a managing agent's wrongdoing. National Union further contends the reprehensibility factor does not support the punitive damage award because the injury suffered was only economic in nature. But the Supreme Court has recognized "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, [citation] . . . can warrant a substantial penalty." (*BMW of North America, Inc. v. Gore, supra,* 517 U.S. at p. 576.)

The second "guidepost[ ]" relevant to the constitutional validity of the punitive damage award is "the disparity between the harm or potential harm suffered . . . and [the] punitive damages award. . . . " (*BMW of North America, Inc. v. Gore, supra,* 517 U.S. at p. 575.) Here, Textron recovered compensatory damages exceeding $165,000. Thus, the ratio between the actual harm caused by National Union and the trial court's reduced punitive damage award of $1.7 million is roughly 10 to 1.

National Union claims the ratio between compensatory damages and punitive damages should not exceed 4 to 1, and thus, the 10 to 1 ratio in this case is constitutionally impermissible. We disagree. *BMW of North America, Inc. v. Gore, supra,* 517 U.S. 559 declared, "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula. . . . " (*Id.* at p. 582.) In a passage relevant to the present case, the Court emphasized this point by noting, "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." (*Ibid.*) While the compensatory award in this case was modest, in light of the reprehensible conduct attributable to National Union, the trial court properly imposed a punitive damage award sufficiently high to achieve the twin objectives of punishment and deterrence.

The third "guidepost[ ]" concerns a comparison of "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct. . . . " (*BMW of North America, Inc. v. Gore, supra,* 517 U.S. at p. 583.) National Union notes the Insurance Code only imposes fines of between $10,000 and $55,000 for

misconduct by insurers. However, Textron notes Penal Code section 550, subdivision (b) makes it a felony subject to fine or imprisonment to "knowingly assist or conspire with any person to" either "[p]resent" or "[p]repare" a "written . . . statement . . . in . . . opposition to [ ] a claim" for insurance benefits, or to "[c]onceal, or . . . fail to disclose the occurrence of [ ] an event that affects any person's initial or continued right or entitlement to any insurance benefit or payment. . . . " (Pen. Code, § 550, subd. (b)(1), (2) & (3).) Furthermore, the focus of an analysis of a punitive damage award's constitutionality is to ensure the wrongdoer "receive[s] fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." (*BMW of North America, Inc. v. Gore, supra,* 517 U.S. at p. 574, fn. omitted.) In reversing the award in *Gore,* the Supreme Court noted "there does not appear to have been any judicial decision in Alabama or elsewhere indicating [the defendant's wrongful activity] might give rise to such severe punishment." (*Id.* at p. 584.) Here, the same cannot be said to be true. It has long been common knowledge acts of bad faith by insurers could subject that party to significant punitive damage awards. (See *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928-929.)

Thus, we conclude that, even under a de novo review, the $1.7 million punitive damage award in this case does not violate National Union's constitutional right to due process of law.

As for the excessiveness of the punitive damage award under state law, "[t]he California Supreme Court has established three criteria for making that determination: (1) the reprehensibility of the defendant's misdeeds; (2) the amount of compensatory damages, though there is no fixed ratio for determining whether punitive damages are

reasonable in relation to actual damages; and (3) the defendant's financial condition. [Citations.]" (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1658.) On appeal, the award is presumed to be correct and will be reversed only if the record, viewed most favorably to the judgment, reflects the award is the result of passion or prejudice. (*Ibid.*)

Our foregoing discussion of the reprehensibility and ratio criteria is equally applicable in this context and need not be repeated. As for the third factor, "[t]he wealthier the wrongdoer, the larger the punitive damage award must be to meet the goals of punishment and deterrence. [Citations.]" (*Stevens v. Owens-Corning Fiberglas Corp., supra,* 49 Cal.App.4th at p. 1658.) Consequently, to enforce the purposes of punishing the wrongdoer and deterring similar future wrongful conduct (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra,* 532 U.S. at p. 432; *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 317), the award necessarily had to be large enough to affect a corporate entity such as National Union. We conclude the punitive damage award is not excessive under California law.

DISPOSITION

The judgment and postjudgment orders are affirmed. Each party shall bear its own costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.

COPY

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TEXTRON FINANCIAL CORPORATION, Plaintiff and Appellant, v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA et al., Defendants and Appellants.	G020323 (Super. Ct. No. 734096) OPINION (Filed Jan. 29, 2001)

Appeals from a judgment and post-judgment orders of the Superior Court of California, County of Orange, Nancy Wieben Stock and Raymond J. Ikola, Judges. Motion to Augment the record on appeal. Judgment and post-judgment orders affirmed. Motion granted.

Albert Weiland & Golden and Marcus M. Kaufman; Stephan, Oringher, Richman & Theodora and Robert M. Dato for Plaintiff and Appellant.

Horvitz & Levy, Mitchell C. Tilner and Peter Abrahams; Lewis, D'Amato, Brisbois & Bisgaard, R. Gaylord Smith and Michael W. Connally for Defendants and Appellants.

* * *

Plaintiff Textron Financial Corporation sued defendant National Union Fire Insurance Company of Pittsburgh, Pennsylvania (National Union) and others over a refusal to honor a claim for insurance benefits concerning property damage to a commercial bus in which it held a security interest. Plaintiff settled with two parties and proceeded to trial against National Union and American International Adjustment Company, Inc. (AIAC), National Union's claims adjuster. After a lengthy trial divided into three phases, the trial court entered judgment on a jury's special verdict awarding plaintiff $165,414.40 in compensatory damages and $10 million in punitive damages against National Union. The court entered judgment, including costs, for AIAC against plaintiff.

Both plaintiff and National Union filed post-judgment motions. The trial court denied National Union's motion for judgment notwithstanding the verdict and plaintiff's motion for new trial, but conditionally granted National Union a new trial unless plaintiff agreed to reduce the punitive damage award to $1.7 million. Plaintiff agreed to the remittitur. The court also struck plaintiff's request for expert witness fees.

National Union appeals from the judgment and the denial of its motion for judgment notwithstanding the verdict, challenging both the punitive damage award on several grounds, and the trial court's refusal to offset the amounts plaintiff received in the pre-trial settlements. Plaintiff appeals, challenging the trial court's striking of its cause of action for unfair business practices, the judgment in favor of AIAC, including costs, the remittitur of punitive damages, and the denial of its request for expert witness fees.

FACTS

Il Sung Ko operated a tour bus company, Taeguk Tour and Sightseeing (Taeguk). Plaintiff loaned Ko funds to purchase a bus, receiving in return a security interest in the vehicle. The security agreement required Ko to insure the bus. Ko obtained a National Union liability insurance policy through D.W. Ferguson & Associates, Inc. (Ferguson), an independent insurance brokerage. The policy was issued through TRM International, Inc. (TRM), a company appointed by National Union to solicit, bind, write, and administer policies for its commercial bus program. The policy listed plaintiff as a loss payee and required National Union to mail plaintiff notice in advance if it cancelled the policy.

Taeguk suffered a downturn in business and Ko failed to timely pay his insurance premiums. In October 1992, TRM sent Ko notice it intended to cancel the policy. TRM did not send a copy of the cancellation notice to plaintiff. The policy terminated November 27.

Beginning in late October and throughout November, Ferguson and Taeguk discussed reducing the insurance premiums by deleting coverage for some of Ko's vehicles. Ferguson also corresponded with a TRM underwriter about the situation, proposing the issuance of a new policy covering only some of Ko's busses. The underwriter suggested an alternative whereby TRM would reinstate the original policy and give Ko a credit against his policy's premium if he agreed to certain conditions, which included delivering the license plates of two buses to Ferguson and temporarily suspending use of those vehicles. Plaintiff presented expert testimony that, unlike a transaction where a vehicle is deleted from a policy, the alternative

approach implemented a procedure described as lay-up credit. Under a lay-up credit, the insured maintains coverage on a vehicle while it is not being operated.

Ko agreed to this proposal, and on December 1, TRM reinstated the policy effective as of November 27. The bus encumbered by plaintiff's security interest was one of the vehicles Ko intended not to use. Plaintiff did not receive notice of the policy reinstatement with the endorsement which reflected Ko's business received a premium credit due to the vehicle's non-use. National Union claimed it sent a copy of this endorsement to plaintiff, but plaintiff denied receiving it.

In January 1993, the bus encumbered by plaintiff's lien suffered extensive damage when it collided with another vehicle on a public highway. At Taeguk's request, Ferguson submitted a notice of claim to AIAC. On February 4, TRM sent AIAC a notice verifying coverage for the vehicle and confirming plaintiff as a loss payee. However, after further correspondence with Taeguk and TRM, AIAC denied the claim, asserting the bus had been deleted from the policy before the accident. TRM prepared an endorsement deleting the bus from the policy (Number 8) on February 16. This endorsement purported to be effective as of December 1, 1992.

In late 1993, Ko defaulted on plaintiff's loan. Plaintiff then learned about the accident and contacted Ferguson concerning insurance benefits to repair the vehicle. Ferguson informed plaintiff the bus had been removed from the policy before the accident. Plaintiff sued Ko, recovering a judgment against him and incurring $3,859.50 in legal fees in the process. However, Ko filed bankruptcy and discharged the debt.

Plaintiff submitted a claim to National Union for benefits under the insurance policy. At that time, it possessed only a certificate of insurance, not a copy of the policy.

AIAC also handled plaintiff's claim. TRM informed AIAC the encumbered bus had been deleted from the policy before the accident and sent it a copy of endorsement number 8. A certificate of mailing on that copy covered the part of the endorsement reflecting the date TRM had prepared it. After an AIAC claims manager discussed the matter with John Lavin, a senior underwriter with the division handling National Union's bus program, and Tom Spangenberg, TRM's president, AIAC advised plaintiff the claim was being denied. The basis of the denial was that Ko deleted the bus from the policy before the accident, and TRM and AIAC concluded National Union's policy did not obligate it to give plaintiff advance notice of the deletion. National Union did not send plaintiff a copy of the policy until August 1994. Again, the portion of endorsement Number 8 displaying the date on which it had been prepared was covered by the mailing certificate.

PROCEDURAL BACKGROUND

The trial's first phase dealt with plaintiff's breach of contract claim against National Union. The court found, as a matter of law, the insurance contract's loss-payable clause constituted a separate agreement between plaintiff and National Union, obligating National Union to provide 30 days' notice of the policy's cancellation or the bus's deletion from it, and that National Union failed to comply with this requirement. The jury subsequently returned a

special verdict awarding plaintiff $61,513.80 under the policy.

The second phase involved plaintiff's causes of action for bad faith against National Union and fraud against both National Union and AIAC. The jury returned a special verdict finding National Union violated the policy's implied covenant of good faith and fair dealing and that it acted with oppression, malice, and fraud in doing so. The jury also returned a special verdict, finding National Union liable for intentional misrepresentation and concealment, and awarded plaintiff $3,859.80 in damages. Based on its interpretation of the jury's answers in the special verdict, the trial court entered judgment for AIAC on the fraud count.

During this phase, the trial court also ruled plaintiff could recover $30,268.16 in attorney fees as damages under *Brandt v. Superior Court* (1985) 37 Cal.3d 813. The parties stipulated plaintiff was entitled to $55,616.34 in costs pursuant to *Brandt*. Subsequently, the court denied National Union's request to offset the pretrial settlements plaintiff received from Ferguson ($26,500) and TRM ($62,500) against the compensatory award imposed on it.

The trial's third phase dealt with punitive damages. The jury returned a special verdict assessing $10 million in punitive damages against National Union which the trial court subsequently reduced to $1.7 million. In addition, the judgment awarded plaintiff compensatory damages, consisting of the policy benefits plus interest, the legal expenses recoverable under *Brandt v. Superior Court, supra,* 37 Cal.3d 813, and the damages for fraud. Finally, the court awarded AIAC $10,277.52 in costs against plaintiff.

DISCUSSION

PLAINTIFF'S APPEAL

Demurrer to the Unfair Business Practices Cause of Action

The complaint's fourth count sought injunctive and restitutionary relief under Business and Professions Code section 17200 et seq. against National Union and AIAC for "engag[ing] in unfair competition" in "handling [of plaintiff's] claim, and the claims of other persons." Plaintiff alleged National Union, "aided and abetted" by AIAC, "used misleading documents to falsely suggest that it would provide insurance . . . where it had no intention to do so," and "falsely suggested that it would . . . provid[e] timely notice of [policy] cancellations," "misrepresented the terms and meaning of its policies . . . to provide a pretext for its refusal to provide timely notice," and "engaged in a pattern and practice of wrongful and false cancellations of insurance policies. . . . "

Relying on *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, National Union and AIAC generally demurred to this count. The trial court sustained the demurrers without leave to amend. Citing *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, plaintiff contends the trial court's ruling was erroneous.

Moradi-Shalal held the Unfair Insurance Practices Act (Ins.Code, § 790 et seq.; UIPA) does not create a private cause of action against insurers who violate its provisions. (*Moradi-Shalal v. Fireman's Fund Ins. Companies, supra,* 46 Cal.3d at pp. 304-305.) This rule applies to both first party and third party claims. (*Maler v. Superior Court* (1990) 220 Cal.App.3d 1592, 1597-1598; *Zephyr*

Park v. Superior Court (1989) 213 Cal.App.3d 833, 836-838.) While insurance companies are subject to California laws generally applicable to other businesses, including laws governing unfair business practices (Ins.Code, § 1861.03, subd. (a)), parties cannot plead around *Moradi-Shalal's* holding by merely relabeling their cause of action as one for unfair competition. (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 283-284; *Maler v. Superior Court, supra,* 220 Cal.App.3d at p. 1598; *Safeco Ins. Co. v. Superior Court* (1990) 216 Cal.App.3d 1491, 1494.)

The specific allegations of wrongful conduct contained in plaintiff's fourth cause of action, using misleading documents and misrepresenting both the terms of the insurance policies and its obligations under them for its own benefit, are the type of activities covered by the UIPA. (Ins.Code, § 790.03, subds. (a) & (h).) In *Safeco Ins. Co. v. Superior Court, supra,* 216 Cal.App.3d 1491, the court ordered dismissal of an action which included a request for injunctive relief under Business and Professions Code section 17200 et seq. based on an insurer's allegedly unfair claims settlement practices. (*Id.* at pp. 1493-1494.) "Though the issue is one of first impression, we have no difficulty in deciding the Business and Professions Code provides no toehold for scaling the barrier of *Moradi-Shalal*. . . . To permit plaintiff to maintain this action would render *Moradi-Shalal* meaningless." (*Id.* at p. 1494.) Under the foregoing cases, merely alleging these purported acts constitute unfair business practices under the unfair competition law is insufficient to overcome *Moradi-Shalal.*

In a few cases, the Supreme Court has allowed an action against an insurance company under the unfair

competition law where the alleged conduct constituted an unlawful restraint on trade under the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.), even though it also violated the UIPA. (*Quelimane Co. v. Stewart Title Guarantee Co.* (1998) 19 Cal.4th 26, 43-44; *Manufacturers Life Ins. Co. v. Superior Court, supra,* 10 Cal.4th at pp. 283-284.) "This conclusion does not compromise the rule of *Moradi-Shalal* in any way. The court concluded there that the Legislature did not intend to create new causes of action when it described unlawful insurance business practices in section 790.03, and therefore that section did not create a private cause of action under the UIPA. The court did not hold that by identifying practices that are unlawful in the insurance industry, practices that violate the Cartwright Act, the Legislature intended to bar Cartwright Act causes of action based on those practices." (*Manufacturers Life Ins. Co. v. Superior Court, supra,* 10 Cal.4th at p. 284.)

The case on which plaintiff relies, *State Farm Fire & Casualty Co. v. Superior Court, supra,* 45 Cal.App.4th 1093, held the plaintiff-insureds had sufficiently alleged a cause of action against their insurer under the unfair competition law based on allegations of conduct constituting common law fraud and breach of the implied covenant of good faith and fair dealing, even though the same conduct violated the UIPA. "While *Moradi-Shalal* clearly held that the Legislature did not intend to create new causes of action when it enacted section 790.03, it is also clear that the Legislature did not intend in any way to circumscribe the previously existing common law right of an insured to seek redress for an insurer's fraudulent deception or breach of the covenant of good faith implied in the policy. . . . Thus, . . . common law claims remain as a

firm legal basis on which an insured may rely to seek redress against an insurer." (*Id.* at pp. 1107-1108.)

The persuasiveness of *State Farm* has been undercut by the Supreme Court's subsequent disapproval of its definition of "unfair" business practices. Quoting from *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, *State Farm* declared: "The test of whether a business practice is unfair 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim. . . . [Citations.]'. . . . [A]n 'unfair' business practice occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' [Citation.]" (*State Farm Fire & Casualty Co. v. Superior Court, supra,* 45 Cal.App.4th at pp. 1103-1104, fn. omitted.)

In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, the Supreme Court found this definition "too amorphous and provid[ing] too little guidance to courts and businesses." (*Id.* at pp. 184-185.) While *Cel-Tech Communications* limited its discussion to the context of an action between competitors, the court concluded, "any finding of unfairness to competitors under section 17200 be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition," and that under Business and Professions Code section 17200, "the word 'unfair' . . . means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a

violation of the law. . . . " (*Id.* at pp. 186-187, fn. omitted. See *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1165-1167 [applying *Cel-Tech Communications, Inc.'s* standard in vehicle lessee's action against rental agency for allegedly concealing or obscuring the rental agreement's fuel service charge].)

Harmonizing *Moradi-Shalal's* holding with the foregoing decisions supports a conclusion the trial court properly sustained the demurrers to plaintiff's unfair competition claim. First, the holding in *Safeco Ins. Co. v. Superior Court, supra,* 216 Cal.App.3d 1491 supports this result. Second, this case is distinguishable from *Quelimane* and *Manufacturers Life* in two respects. Neither decision involved an action by an insured or a third party based on the insurer's alleged failure to comply with a policy or to provide benefits. In *Quelimane,* parties who acquired real estate at tax sales sued title insurance companies for refusing to issue policies on their property. *Manufacturers Life* concerned an insurance agency's action against insurance companies for boycotting the agency. Also, in both cases the plaintiff alleged a Cartwright Act violation as the basis for its unfair competition cause of action. Finally, given the Supreme Court's disapproval of *State Farm's* "amorphous" definition of "unfair" practices and its focus on legislatively declared public policy, reliance on general common law principles to support a cause of action for unfair competition is unavailing.

Under these circumstances, the trial court properly found plaintiff failed to state a cause of action against National Union and AIAC for unfair business practices.

The Jury's Phase Two Findings

During the second phase, the jury returned a special verdict containing findings on the elements of two theories of deceit, intentional misrepresentation and concealment of a material fact. The jury's responses reflect it found both National Union and AIAC made representations of a material fact on which plaintiff justifiably relied to its injury, and that both defendants made the representations "recklessly without knowing whether [they were] true or false." However, the jury concluded AIAC did not know the representations were false, and did not make them with the intent to defraud plaintiff. On the concealment theory, the jury found both defendants concealed or suppressed a material fact which resulted in injury to plaintiff, but also found AIAC did not intentionally conceal or suppress a material fact with the intent to defraud plaintiff. In addition, the jury concluded both defendants were "guilty of fraud, malice, or oppression in the conduct upon which [it] based [its] finding of liability. . . ."

When the jury returned its special verdict, the court discussed the inconsistency in the findings with counsel, and ultimately ruled AIAC "is not liable for fraud or concealment." Plaintiff argues the trial court erred by construing the jury's findings to exonerate AIAC.

The distinction between a general verdict and a special verdict is that under the former a jury "pronounce[s] generally upon all or any of the issues," while the latter is one "by which the jury find the facts only, leaving the judgment to the court." (Code Civ. Proc., § 624.) In a case "[w]here a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." (Code Civ.

Proc., § 625; see also *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1156-1157; *Bond v. DeWitt* (1954) 126 Cal.App.2d 540, 544.)

The jury's findings that AIAC made representations recklessly but without knowing the statements were false are inherently inconsistent. A representation made recklessly without knowledge of its falsity is sufficient to establish scienter. (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 705, p. 806.) However, on both fraud theories the jury found AIAC did not act with an intent to defraud plaintiff. An intent to induce a particular act by the plaintiff is essential to establish liability for either an intentional misrepresentation or concealment of a material fact. (*Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 157; 5 Witkin, Summary of Cal. Law, *supra*, §§ 706 & 710, pp. 807, 810.) The absence of this element defeats plaintiff's fraud claim against AIAC. Furthermore, the finding relevant to defendants' punitive damages liability was in the nature of a general verdict and is subordinate to the jury's specific finding of no intent to defraud. Thus, the trial court properly entered judgment for AIAC on the fraud claim.

Plaintiff contends AIAC could be found liable either as a co-conspirator of National Union or on a theory of negligent misrepresentation. These contentions are without merit.

First, since plaintiff did not assert the latter theory at trial, and the court did not instruct the jury on it, it is now too late to do so. (*Overgaard v. Johnson* (1977) 68 Cal.App.3d 821, 826.) Second, while the court did instruct the jury on conspiracy as a basis for imposing liability, as plaintiff concedes, the jury was not asked to return a

special verdict on this allegation. Had the jury concluded AIAC was liable as a co-conspirator with National Union, it should have returned a finding of an intent to defraud.

A review of plaintiff's closing argument also reflects it relied on the representations and conduct of AIAC's employees, not conspiracy, to support its fraud claim. In fact, while discussing the question of whether National Union acted with malice, plaintiff's counsel suggested no conspiracy existed. "An insurance company whose job is to . . . investigate the situation thoroughly, concealing information which it knows is going to lead to a discovery that there's coverage – even concealing that information from its own claims people so that they won't have a guilty conscience about denying the claim – that's malice."

The trial court properly entered judgment for AIAC on the fraud claim.

The Attorney Fees Damage Award

Plaintiff retained legal counsel under an agreement requiring it to pay counsel 40 percent of all amounts recovered in the case. After a lengthy discussion, the trial court limited the attorney fees plaintiff could recover as damages under *Brandt v. Superior Court, supra,* 37 Cal.3d 813, to 40 percent of the amount recovered as policy benefits during the trial's first phase. Plaintiff attacks this ruling and claims it should have been allowed to recover the reasonable value of counsel's services which it calculates is nearly $300,000 greater than the amount awarded by trial court. This contention lacks merit.

Brandt held attorney fees reasonably incurred to compel payment of policy benefits tortiously withheld by

an insurer are recoverable as an element of damages. (*Brandt v. Superior Court, supra,* 37 Cal.3d at pp. 815, 817.) "When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss – damages – proximately caused by the tort. [Citation.]" (*Id.* at p. 817.)

The retainer agreement required plaintiff to pay counsel 40 percent of all sums recovered in this action. It had no further legal obligation to pay counsel for the legal services rendered to it. *Brandt* expressly held the "fees recoverable . . . may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract." (*Brandt v. Superior Court, supra,* 37 Cal.3d at p. 819.) Plaintiff cites no authority permitting a post-trial modification of the retainer agreement. Thus, the trial court did not err by limiting the attorney fee damage award to the percentage specified in the parties' contingency agreement.

The Post-Judgment Costs Award

Plaintiff attacks the trial court's post-judgment rulings concerning the award of costs on two grounds. Both arguments lack merit.

First, it disputes the court's finding AIAC was a prevailing party. Plaintiff argues that since National Union and AIAC filed a joint answer to the complaint and were represented by the same counsel during trial, they held a unity of interest which precludes AIAC from acquiring this status.

Code of Civil Procedure section 1032 defines prevailing party to include "a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. . . . [I]n situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides. . . . " (Code Civ. Proc., § 1032, subd. (a)(4).) In conformity with this statute, the case law holds that where only one of multiple, jointly-represented defendants presenting a unified defense prevails in an action, the trial court has discretion to award or deny costs to that party. (*Webber v. Inland Empire Investments, Inc.* (1999) 74 Cal.App.4th 884, 920; *Slavin v. Fink* (1994) 25 Cal.App.4th 722, 725-726; *Smith v. Circle P Ranch Co.* (1978) 87 Cal.App.3d 267, 272.)

Plaintiff asserts the trial court did not exercise its discretion in this case, citing a statement by the trial judge during the hearing on the motion to strike AIAC's cost bill. However, the court made that comment in response to plaintiff's contention "no evidence" exists "to support any particular allocation" between AIAC and National Union, and that the latter entity presumably "fronted" AIAC's trial expenses. The record as a whole does not support a conclusion the trial court failed to exercise its discretion concerning AIAC's status and its recovery of costs.

The related arguments also fail. Contrary to plaintiff's assertion this is not a case where it established wrongdoing against AIAC, but simply failed to recover a monetary award. The jury found AIAC did not commit

fraud. Furthermore, since the injunctive relief claim had been previously dismissed, this was an action for damages. Thus, the evidence indicating AIAC subsequently modified its operating procedures concerning claims handling does not preclude it from being deemed a prevailing party.

Second, plaintiff contends the trial court erred by denying its recovery of expert witness fees under Code of Civil Procedure section 998. Nearly a year before trial, plaintiff served on National Union and AIAC an unsuccessful pretrial offer to compromise proposing "to allow judgment be taken . . . against defendants" for $626,489.26. In denying plaintiff's request for expert witness fees, the court cited *Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579.

Code of Civil Procedure section 998, subdivision (d) authorizes the court to award a prevailing plaintiff its expert witness fees if the plaintiff made timely pretrial offer to compromise which the defendant does not accept, and "the defendant fails to obtain a more favorable judgment. . . . " In *Taing,* the court reversed an award of costs, declaring "if a plaintiff elects to submit a section 998 offer in cases involving multiple defendants, the offer to any defendant against whom the plaintiff seeks to extract penalties for nonacceptance must be sufficiently specific to permit that individual defendant to determine the exact amount plaintiff is seeking from him or her." (*Taing v. Johnson Scaffolding Co., supra,* 9 Cal.App.4th at p. 586.) *Taing* explained its rule as follows: "[A]n unapportioned offer by a single plaintiff to multiple defendants . . . requires any defendant who wants to accept to obtain the concurrence of his or her codefendants. This places a reasonable defendant at the mercy of codefendants whose refusal to settle may be unreasonable." (*Id.* at p. 585.)

National Union and AIAC were not jointly and severally liable to plaintiff. (Cf. *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1996) 50 Cal.App.4th 1542, 1547-1549.) The complaint sought recovery against National Union on theories of breach of contract, bad faith, and fraud. AIAC was alleged to be liable only on the latter theory. Furthermore, the evidence relating to each defendant's liability for fraud was separate. Thus, the trial court did not err by exercising its discretion to deny recovery of expert witness fees in this case.

NATIONAL UNION'S APPEAL

Denial of an Offset

National Union moved to have the settlement amounts plaintiff received from Ferguson and TRM offset against the damages plaintiff recovered from it. The trial court issued a lengthy written order denying the request as to both the contractual damages and the tort damages recovered by plaintiff. National Union contends the trial court erred by denying an offset in this case.

Consistent with the general rule imposing on a party the burden of proving the existence or nonexistence of each fact essential to a claim or defense (Evid.Code, § 500), "[a] defendant seeking an offset against a money judgment has the burden of proving the offset. [Citation.]" (*Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 444.)

With respect to plaintiff's contractual recovery, an insured is entitled to receive compensation in accordance with the policy terms, and an insurer cannot reduce the amount recoverable "merely because [the insured] has 'collateral contracts or relations with third persons which relieve him wholly or partly from the loss against which

the insurance company agreed to indemnify him.' [Citations.]" (*Strickland v. Federal Ins. Co.* (1988) 200 Cal.App.3d 792, 801, quoting *Hughes v. Potomac Ins. Co.* (1962) 199 Cal.App.2d 239, 251, disapproved on another point in *Sabella v.. Wisler* (1963) 59 Cal.2d 21, 34.) An insurer's right to recoup payment of policy benefits is covered by the principle of subrogation. To qualify for subrogation, the insurer must pay the insured's loss. (*Sapiano v. Williamsburg Nat. Ins. Co.* (1994) 28 Cal.App.4th 533, 538; *Chase v. National Indemnity Co.* (1954) 129 Cal.App.2d 853, 861- 862.)

National Union refused to pay any policy benefits to plaintiff. The cases on which it relies to establish an offset against the contract damages involve an insured's recovery of tort damages and whether the collateral source rule applied. Its contention the trial court "misread" *Kardly v. State Farm Mut. Auto. Ins. Co.* (1989) 207 Cal.App.3d 479 is incorrect. Contrary to National Union's claim, *Kardly* did not hold the insurer waives the right of subrogation by breaching the insurance contract. The part of the *Kardly* opinion National Union quotes refers to the facts of another appellate decision. (*Id.* at p. 489.) Thus, the trial court properly refused to offset the Ferguson and TRM settlements against the contractual damage award.

As for plaintiff's recovery of tort damages, the trial court agreed the collateral source doctrine did not apply because Ferguson and TRM could not be deemed collateral sources under the facts of this case. However, the court detailed the potential liability facing Ferguson and TRM, and found their potential liability exceeded $261,000 which included nonduplicative exposure exceeding $96,000. Applying the tort of another doctrine, the court concluded the settlement sums paid by Ferguson and TRM

should not be offset against plaintiff's recovery from National Union.

Generally, a party cannot obtain double recovery for the same wrong where joint or concurrent tortfeasors are jointly and severally liable for the same wrong. (6 Witkin, Summary of Cal. Law, *supra,* Torts, § 1322, at p. 779.) "[I]t has long been recognized that if one tortfeasor pays partial compensation to the plaintiff, the liability of other tortfeasors will be correspondingly reduced: '. . . payments by one tortfeasor on account of a harm for which he and another are each liable, diminish the amount of the claim against the other whether or not it was so agreed at the time of payment and whether the payment was made before or after judgment. Since the plaintiff can have but one satisfaction, evidence of such payments is admissible for the purpose of reducing pro tanto the amount of the damages he may be entitled to recover.' [Citations.]" (*Krusi v. Bear, Stearns & Co.* (1983) 144 Cal.App.3d 664, 673.)

Where tortious acts by separate persons produce the same indivisible injury, each person is liable for the whole loss even if they did not act in concert. (*Sanchez v. Bay General Hospital* (1981) 116 Cal.App.3d 776, 796.) Thus, while plaintiff sued National Union for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud, but only sought damages against Ferguson and TRM for negligence, the injury it suffered was the same.

However, the court did find the tort of another doctrine applicable to this case. "A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the

reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred. [Citations.]" (*Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618, 620.)

Generally, a party seeking to recover litigation costs under this rule must plead and prove the claim. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 869, fn. 4.) While plaintiff did not do so here, the potential for its recovery of damages from Ferguson and TRM was made known to them during pretrial discovery. Furthermore, had it not settled with Ferguson and TRM, plaintiff could have amended the complaint to assert its right to recover the fees and expenses incurred in its action against National Union.

The record reflects National Union failed to establish the trial court erred by denying its request for an offset.

PUNITIVE DAMAGES

Introduction

Both parties attack the punitive damage award. National Union challenges the sufficiency of the evidence supporting the recovery of exemplary damages, the court's refusal to instruct the jury National Union could only be subject to punitive damages based on its own employees' conduct, and the constitutionality of the award imposed on it. Plaintiff contends the trial court erred by reducing the punitive damage award to $1.7 million.

Sufficiency of the Evidence

National Union claims its own conduct was not oppressive, fraudulent, or malicious, TRM's activity cannot be attributed to it, and it did not ratify TRM's actions.

Civil Code section 3294 authorizes the award of punitive damages in any "action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. . . . " (Civ. Code, § 3294, subd. (a).) In *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, the Supreme Court upheld an award of punitive damages against an insurer based on evidence two employees, a claims manager and a claims adjuster, failed to adequately investigate the insured's claims under a disability insurance policy. "The determination whether employees act in a managerial capacity, however, does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy. When employees dispose of insureds' claims with little if any supervision, they possess sufficient discretion for the law to impute their actions concerning those claims to the corporation." (*Id.* at pp. 822-823.)

Subsequently, the Legislature amended Civil Code section 3294 to provide, "[a]n employer shall not be liable for [punitive] damages . . . based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or

malice must be on the part of an officer, director, or managing agent of the corporation." (Civ. Code, § 3294, subd. (b).)

In *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, the Supreme Court considered the effect of this amendment in an action for wrongful termination. The plaintiff, a convenience store employee, had been fired by a manager who was responsible for eight stores, covering sixty-five employees. The jury awarded plaintiff both compensatory and punitive damages.

In affirming, the Supreme Court concluded that "in amending section 3294, the Legislature intended (like *Egan, supra,* 24 Cal.3d at p. 823) to limit corporate punitive damage liability to those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy." (*White v. Ultramar, Inc., supra,* 21 Cal.4th at p. 573.) The court noted "section 3294, subdivision (b), placed ['managing agent'] next to the terms 'officer' and 'director,' intending that a managing agent be more than a mere supervisory employee. The managing agent must be someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy. Thus, by selecting the term 'managing agent,' and placing it in the same category as 'officer' and 'director,' the Legislature intended to limit the class of employees whose exercise of discretion could result in a corporate employer's liability for punitive damages." (*Ibid.*) The critical factor "'"'. . . is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy." [Citation.]'" (*id.* at p. 573.)

The agency agreement between National Union and TRM and the evidence in this case shows TRM had broad discretion over National Union's bus insurance program. TRM could "solicit, bind, write and administer insurance" policies, and "exercise [its] independent judgment as to the time, place and manner of soliciting insurance and servicing policyholders." There was evidence AIAC directed its employees to contact TRM when seeking coverage verification. In this case, TRM participated in issuing the policy to Ko, in subsequently canceling it, and then reinstating a modified version of it. Later, when Ko submitted a claim on the bus, TRM initially issued a coverage determination, but then prepared an endorsement deleting the vehicle from the policy, and advised AIAC to deny the claim. Furthermore, TRM's president was in contact with both AIAC and the senior management of the division handling National Union's bus program when plaintiff's claim was being considered, and participated in the ultimate decision to deny it. This evidence supports the jury's conclusion TRM was National Union's managing agent, thereby subjecting it to punitive damages under Civil Code section 3294. (*White v. Ultramar, Inc., supra,* 21 Cal.4th at p. 577; *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d at p. 823.)

In light of this conclusion it is unnecessary to consider National Union's additional claims concerning instructional error and the insufficiency of the evidence based on its own conduct.

Validity of the Trial Court's Remittitur

The trial court issued a post-judgment order conditionally granting National Union a new trial on the

insurance bad faith and fraud counts, and plaintiff's right to receive punitive damages unless the latter agreed to reduce the punitive damage award to $1.7 million. Plaintiff timely consented to the remittitur. After National Union filed its appeal, plaintiff cross-appealed and now challenges the remittitur's validity.

A trial court has the discretion to conditionally grant a new trial unless the plaintiff consents to a reduction of a damages award where the court independently determines the jury's award is excessive. (Code Civ. Proc., § 662.5, subd. (b); *Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 452-453; *West v. Johnson & Johnson Products, Inc.* (1985) 174 Cal.App.3d 831, 876.) Reversal of the ruling is allowed only where there is no substantial basis in the record to support the reasons articulated by the trial court for its decision. (Code Civ. Proc., § 657; *Jahn v. Brickey* (1985) 168 Cal.App.3d 399, 408.)

The court noted the ratio of the original punitive damage award to compensatory damages (60 to 1) created a presumption the jury's verdict was the result of passion and prejudice. (*Rosener v. Sears, Roebuck & Co.* (1980) 110 Cal.App.3d 740, 752.) Plaintiff focuses much its argument on the reprehensible nature of National Union's conduct. While the court agreed the evidence supported the jury's conclusion National Union had acted reprehensibly, it concluded the jury had placed too much emphasis on National Union's financial wealth and failed to adequately consider the relationship between the injury suffered by plaintiff and the amount of the punitive damage award. The court noted this lawsuit involves an action by one corporate entity against another corporate entity to recover only for economic loss, the value of plaintiff's

security interest in a damaged bus. Given these circumstances, the trial court noted upholding the original award raised serious constitutional concerns.

Plaintiff also challenges the portion of the remittitur order requiring it to choose between a reduction in punitive damages and a new trial on *both* liability and the amount of punitive damages. In so ruling, the trial court cited *Medo v. Superior Court* (1988) 205 Cal.App.3d 64. Plaintiff relies on *Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771 in challenging the trial court's ruling.

Torres held Civil Code section 3295, subdivision (d) did not require an *appellate* court which reverses an excessive punitive damage award to order a new trial on all issues, including liability and the amount of compensatory damages. (*Id.* at pp. 777-781.) In so ruling, *Torres* distinguished *Medo*. (*Id.* at p. 780.) In *Medo,* the *trial* court ordered a new trial on all issues when the jury was discharged after completion of the liability phase. While agreeing with the plaintiffs' assertion that the defendants had waived their right to have the same jury determine both liability and the right to punitive damages, the appellate court nonetheless noted, "[p]unitive damages are not simply recoverable in the abstract. They must be tied to oppression, fraud or malice *in the conduct which gave rise to liability in the case.* Thus . . . , the instruction on punitive damages[ ] tells the jury that in arriving at an award of punitive damages, it is to consider the reprehensibility of the conduct of the defendant and that the punitive damages must bear a reasonable relation to the actual damages. In order for a jury to evaluate the oppression, fraud or malice in the conduct giving rise to liability in the case, it must consider the conduct giving rise to

liability." (*Medo v. Superior Court, supra,* 205 Cal.App.3d at p. 68.)

However, even assuming the trial court erred by relying on *Medo* to order a new trial on all issues if plaintiff refused to accept a reduction in the punitive damage award, the ruling does not require reversal. As the trial judge concluded, the jury's $10 million punitive damage award was clearly constitutionally suspect. Thus, ordering a remittitur in this case was appropriate under the circumstances.

Constitutionality of the Award

Finally, National Union contends that even the $1.7 million punitive damage award is excessive and unconstitutional. This argument lacks merit.

Punitive damages have two purposes; punish the wrongdoer and deter similar misconduct in the future by making an example of the wrongdoer. (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 317; *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1658.) "The essential question for the jury, the trial court, and the appellate courts is whether the amount of the award substantially serves the public interest in punishment and deterrence. The California Supreme Court has established three criteria for making that determination: (1) the reprehensibility of the defendant's misdeeds; (2) the amount of compensatory damages, though there is no fixed ratio for determining whether punitive damages are reasonable in relation to actual damages; and (3) the defendant's financial condition. [Citations.]" (*Stevens v. Owens-Corning Fiberglas Corp., supra,* 49 Cal.App.4th at p. 1658.) On appeal, a judgment

awarding punitive damages is presumed to be correct and will be reversed only if the record, viewed most favorably to the judgment, reflects the award is the result of passion or prejudice. (*Ibid.*)

The United Supreme Court has recognized that an excessive punitive damage award may also violate a person's constitutional right to due process of law. (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 562; *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 454.) In *BMW,* the court noted: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." (*BMW of North America, Inc. v. Gore, supra,* 509 U.S. at p. 574, fn. omitted.) The court identified "[t]hree guideposts" to consider in analyzing the constitutionality of a punitive damage award: "[T]he degree of reprehensibility [of the wrongdoer's conduct]; the disparity between the harm or potential harm suffered . . . and [the] punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." (*Id.* at pp. 574-575.)

The record reflects the present award is permissible under both state and federal law. While it is true the loss involved only economic injury, the evidence reflects National Union engaged in reprehensible conduct. To enforce the purposes of punishing the wrongdoer and deterring similar future wrongful conduct, the award necessarily had to be large to affect a corporate entity such as National Union. "The wealthier the wrongdoer, the larger the punitive damage award must be to meet the goals of punishment and deterrence. [Citations.]" (*Stevens v.*

Owens-Corning Fiberglas Corp., supra, 49 Cal.App.4th at p. 1658.)

National Union does not dispute the fact reprehensible conduct occurred in this case. It only argues TRM, not it, committed the wrongdoing. But Civil Code section 3294, subdivision (b) permits the imposition of punitive damages on a person held vicariously liable for another's actions. National Union also focuses on the ratio between the punitive damage award and the compensatory damage award. While punitive damages must bear a reasonable relation to the actual damages suffered by the plaintiff, no fixed ratio exists to determine the proper proportion between them. (*Finney v. Lockhart* (1950) 35 Cal.2d 161, 164; *Zhadan v. Downtown L.A. Motors* (1976) 66 Cal.App.3d 481, 498.)

Thus, we conclude the award of $1.7 million in punitive damages in this case is not excessive, nor does it violate National Union's constitutional right to due process of law.

DISPOSITION

The judgment and post-judgment orders are affirmed. The motion to augment the record on appeal is granted. Each party shall bear its own costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P.J.

O'LEARY, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

TEXTRON FINANCIAL CORPORATION, A Delaware Corporation, Plaintiff, vs. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA; and AMERICAN INTERNATIONAL ADJUSTMENT COMPANY, INC., Defendant.	CASE NO. 734096 ASSIGNED FOR ALL PURPOSES TO: JUDGE RAYMOND J. IKOLA DEPT. 8 ~~[PROPOSED]~~ **JUDGMENT** **TRIAL DATE: 2/26/96** (Filed May 29, 1996)

This action came on regularly for trial by jury, beginning on February 26, 1996, in Department 8 of the above-entitled Court, Honorable Raymond J. Ikola, presiding. Plaintiff Textron Financial Corporation ("Textron") appeared by its attorneys, Steven H. Gentry and David B. Ezra of Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, and defendants National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") and American International Adjustment Company ("AIAC") appeared by their attorneys, R. Gaylord Smith and Michael Connally of Lewis, D'Amato, Brisbois & Bisgaard.

During the trial, the Court ruled that there was coverage for Textron's claim, as a matter of law. The Court concluded that the actions of the first named insured, Il Sung Ko, could not have terminated Textron's protection under the applicable policy.

During the trial, the Court granted National Union's motion for nonsuit, but only to the extent that Textron's complaint included allegations of a conspiracy to commit insurance bad faith. In all other respects, National Union's motions for nonsuit, and its motions for directed verdicts, were denied.

A jury of twelve persons was duly impaneled and sworn; witnesses testified; and after being duly instructed by the Court, the jury deliberated and thereon duly returned the following special verdict in Phase I:

"We, the jury, find and report to the court our special verdict in phase 1 of the trial in this matter as follows:

1. What is the amount of money payable to Textron under the policy? $61,513.80.

2. Did Textron fail to mitigate its damages?

Yes ___ No __x__

3. If your answer to the previous question was yes, state the amount of damages caused by Textron's failure to mitigate: _____.

Dated: March 14, 1996

/s/
Foreperson
Jon A. Ribble"

Thereafter, the Court ruled that Textron's attorney fee damages could not exceed the law firm's contingent percentage (40%) of the amounts unreasonably withheld by National Union (together with interest).

Based on the Court's ruling, evidence of time incurred by Textron's attorneys in an effort to compel payment of policy benefits was not presented to the jury. Textron and

National Union stipulated, based on the ruling of the Court, that Textron's attorney fee recovery would be 40% of $61,513.80 (plus interest from January 25, 1994), together with expenses in the amount of $55,616.34.

After being duly instructed by the Court, the jury deliberated and thereon duly returned the following special verdict in Phase II:

"We, the jury in the above entitled case, find the following on the questions submitted to us:

1. Do you find by a preponderance of the evidence that Nation[al] Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") violated the implied covenant of good faith and fair dealing owing to Textron?

Yes x No ___

If you answer "No" to Question No. 1, then go to Question No. 5. If you answer "Yes", then answer Questions Nos. 2, 3, and 4.

2. Do you find by clear and convincing evidence that National Union was guilty of oppression in the conduct upon which you based your finding of liability for breach of the implied covenant of good faith and fair dealing?

Yes x No ___

3. Do you find by clear and convincing evidence that National Union was guilty of malice in the conduct upon which you based your finding of liability for breach of the implied covenant of good faith and fair dealing?

Yes x No ___

4. Do you find by clear and convincing evidence that National Union was guilty of fraud in the conduct upon which you based your finding of liability for breach of the implied covenant of good faith and fair dealing?

Yes x No ___

5. Did either defendant make a representation as to a past or existing material fact?

National Union: Yes x No ___

AIAC: Yes x No ___

If you answer Question No. 5 "No" as to both defendants, go to Question No. 15. If you answer Question No. 5 "Yes" as to either defendant, then answer the next question.

6. Was the representation false?

National Union: Yes x No ___

AIAC: Yes x No ___

If you answer Question No. 6 "No" as to both defendants, got [sic] to Question No. 15. If you answer Question No. 6 "Yes" as to either defendant, then answer questions 7a and 7b.

7a. Did either defendant know that the representation was false when it was made?

National Union: Yes x No ___

AIAC: Yes ___ No x

7b. Did either defendant make the representation recklessly without knowing whether it was true or false?

National Union: Yes _x_ No ___

AIAC: Yes _x_ No ___

If you answer both Questions 7a and 7b "No" as to both defendants, go to Question No. 15. If you answer Question No. 7A or 7b "Yes" as to either defendant, then answer the next question.

8. Did either defendants make the representation with an intent to defraud the plaintiff?

National Union: Yes _x_ No ___

AIAC: Yes ___ No _x_

If you answer Question No. 8 "No" as to both defendants, go to Question No. 15. If you answer Question No. 8 "Yes" as to either defendant, then answer the next question.

9. Was the plaintiff aware of the falsity of the representation?

Yes ___ No _x_

If you answer Question No. 9 "Yes", go to Question No. 15. If you answer Question No. 9 "No", then answer the next question.

10. Did the plaintiff act in reliance upon the truth of the representation?

Yes _x_ No ___

If you answer Question No. 10 "No", go to Question No. 15. If you answer Question No. 10 "Yes", then answer the next question.

11. Was the plaintiff justified in relying upon the representation?

Yes _x_ No ___

If you answer Question No. 11 "No", go to Question No. 15. If you answer Question No. 11 "Yes", then answer the next question.

12. Did either defendant's misrepresentation cause plaintiff damage?

National Union: Yes _x_ No ___

AIAC: Yes _x_ No ___

If you answer Question No. 12 "No" as to both defendants, go to Question No. 15. If you answer Question No. 12 "Yes" as to either defendant, then answer the next question.

13. What is the total amount of all damage suffered by the plaintiff and caused by the reliance upon the truth of the representation?

Answer: $3859.50

If you answer Question No. 13 "No Damage", then go to Question No. 15. If you filled in a dollar amount in answer to Question No. 13, then answer the next question.

14. Do you find by clear and convincing evidence that either defendant was guilty of fraud, malice, or oppression in the conduct upon which you based your finding of liability for fraud?

National Union: Yes _x_ No ___

AIAC: Yes _x_ No ___

15. Did either defendant conceal or suppress a material fact?

National Union: Yes _x_ No ___

AIAC: Yes _x_ No ___

If you answer Question No. 15 "No" as to both defendants, then sign and return the verdict. If you answer Question No. 15 "Yes" as to either defendant, then answer the next question.

16. Did either defendant intentionally conceal or suppress the material fact with the intent to defraud the plaintiff?

National Union: Yes _x_ No ___

AIAC: Yes ___ No _x_

If you answer Question No. 16 "No" as to both defendants, then sign and return the verdict. If you answer Question No. 16 "Yes" as to either defendant, then answer the next question.

17. Was the plaintiff aware of the material fact at the time plaintiff acted?

Yes ___ No _x_

If you answer Question No. 17 "Yes", then sign and return the verdict. If you answer Question No. 17 "No", then answer the next question.

18. Would the plaintiff had acted in the way it did if it had known of the concealed or suppressed material fact?

Yes ___ No _x_

If you answer Question No. 18 "Yes", then sign and return the verdict. If you answer Question No. 18 "No.", then answer the next question.

19. Did either defendant's concealment or suppression of the material fact cause plaintiff damage?

National Union: Yes _x_ No ___

AIAC: Yes _x_ No ___

If you answer Question No. 19 "No" as to both defendants, then sign and return the verdict. If you answer Question No. 19 "Yes", as to either defendant, then answer the next question.

20. What is the total amount of all damage suffered by the plaintiff and caused by the concealment or suppression of the material fact?

Answer: $3859.50

If you answer Question No. 20 "No Damage", then sign and return the verdict. If you filled in the dollar amount in answer to Question No. 20, then answer the next question.

21. Do you find by clear and convincing evidence that either defendant was guilty of fraud, malice, or oppression in the conduct upon which you based your finding of liability for the intentional concealment or suppression of a material fact?

National Union: Yes _x_ No ___

AIAC: Yes _x_ No ___

Please sign and date this verdict form.

Jon A. Ribble
Dated: April 11, 1996 /s/
Foreperson

Based upon this verdict, the Court determined that AIAC was entitled to judgment in its favor.

After being duly instructed by the Court, the jury deliberated and thereon duly returned the following special verdict in Phase III:

"We, the jury in the above entitled action, find the following special verdict on the questions submitted to us:

1. Shall punitive damages be assessed against defendant National Union Fire Insurance Company of Pittsburgh, Pennsylvania?

Yes x No ___

If your answer is "yes," please answer the next question. If your answer is "no," have your foreperson sign and date this special verdict.

2. We assess punitive damages against National Union Fire Insurance Company of Pittsburgh, Pennsylvania, as follows:

$10,000,000.00

Please sign and date this verdict form.

Jon A. Ribble
Dated: April 12, 1996 /s/
Foreperson

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED as follows:

Plaintiff Textron Financial Corporation shall have and recover judgment against defendant National Union Fire Insurance Company of Pittsburgh, Pennsylvania:

1. For general and compensatory damages, $165,414.40 (representing $61,513.80 in unpaid policy benefits, $14,156.60 in interest on unpaid benefits from January 24, 1994 to May 14, 1996, $85,884.50 pursuant to *Brandt v. Superior Court*, and $3,859.50 in additional damages on the fraud cause of action);

2. For punitive damages, ten million dollars ($10,000,000.00);

3. Plus costs and disbursements in the amount of $39,280.31*. [10/8/96 MIS] [*(Per order of 7-29-96)]

Defendant American International Adjustment Company shall have judgment against plaintiff Textron Financial Corporation and shall recover costs and disbursements in the amount of $10,277.52 [(Per m o of 10-3-96)]

DATED: 5/29/96 By: Raymond J. Ikola
RAYMOND J. IKOLA,
Judge of the Superior Court

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF ORANGE

TEXTRON FINANCIAL CORPORATION, a Delaware corporation, Plaintiff, vs. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, et al., Defendants.	CASE NO. 73 40 96 RULING AND ORDER CONDITIONALLY GRANTING NATIONAL UNION'S MOTION FOR NEW TRIAL (Filed Jul. 29, 1996)

The court, having read and considered the Motion for New Trial filed herein by defendant National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union"), together with the papers filed in opposition to the motion by plaintiff Textron Financial Corporation ("Textron") and the papers filed in reply to the opposition by National Union, and having heard and considered the arguments made by both parties at the hearing on the motion on July 25, 1996, now rules as follows:

National Union's Motion for New Trial is granted as to the causes of action for fraud and for breach of the implied covenant of good faith and fair dealing and the award of punitive damages on the ground that the award of punitive damages is excessive. The new trial will be as to National Union only. Provided, however, that the order granting a new trial is denied if Textron consents to a reduction of the $10 million award of

punitive damages in the amount of $8.3 million to a total award of punitive damages in the amount of $1.7 million ($1,700,000.00). The court, in its independent judgment, has determined from the evidence that a punitive damage award of $1.7 million is fair and reasonable.

The reasons the court has conditionally granted the motion for new trial on the ground of excessive damages are as follows.

The jury was instructed, in connection with making its determination of whether to award punitive damages, to consider: (i) the reprehensibility of the conduct of the defendant; (ii) the amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition; and (iii) that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff." BAJI 14.72.2 The court has concluded that the jury gave undue emphasis to the second factor, i.e., the amount of damages which will have a deterrent effect in light of the defendant's financial condition, and insufficient emphasis to the third factor, i.e., the relationship between the damage suffered and the amount of the award. The punitive damages awarded by the jury amounted to slightly more 60 times the total compensatory award. In *Rosener v Sears, Roebuck & Co.*, 110 Cal.App.3d 740, 752 (1980), the court referred to an award in which the ratio of punitive to compensatory damages was approximately 63 to 1, with a difference in the awards of $9.85 million, as "grossly disproportionate," raising "a presumption that it was the result of passion or prejudice." *Id.* at 752. In the case at bar the ratio of punitive to compensatory damages is 60 to 1,

and the difference is $9.83 million. The same presumption of passion or prejudice is as apparent in this case as it was in *Rosener*. The amount awarded by the jury greatly exceeds that which is necessary to deter future conduct of the type shown by the evidence in this case.

Further, the court is obliged to examine the award in light of the federal due process "guideposts" outlined by the U.S. Supreme Court in *BMW of North America v Gore*, 96 D.A.R. 5747 (May 20, 1996), a decision announced after the jury reached its verdict. The first guidepost, described by the *BMW* court as "perhaps the most important indicium of the reasonableness of a punitive damages award" is "the degree of reprehensibility of the defendant's conduct." This guidepost matches one of the factors given to the jury to consider in this case consistent with *Neal v Farmers Ins. Exchange*, 21 Cal.3d 910, 928 (1978). Although the court finds that the jury had sufficient evidence to find that National Union's conduct was sufficiently reprehensible to merit the imposition of punitive damages, the court also notes, as did the Supreme Court in *BMW*, that the harm inflicted was purely economic in nature. Nothing done by the defendant showed any "indifference to or reckless disregard for the health or safety of others." *BMW* at 5750. This factor has also been used by California courts in the process of assessing the reprehensibility of the defendant's conduct when reviewing a punitive damage award. For example, the court in *Seeley v Seymour*, 190 Cal.App.3d 844, 867 (1987) observed that the parties in that case were sophisticated businessmen of relatively equal bargaining strength, and thus the situation carried "a lesser degree of 'reprehensibility'" than the more typical punitive damage case where a large or

sophisticated business enterprise uses its wealth or power to exploit the weak or the unwary. *Id.* The court concludes that in this case as well, the parties were both large business enterprises, neither of which was able to exploit the other.

The second *BMW* guidepost is the ratio of the punitive damages to the actual harm. This factor has been addressed above under California law. The U.S. Supreme court has stated that it is impossible to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." The Court reiterated, however, that a "general concern of reasonableness properly enters into the constitutional calculus." As noted above, this court concludes that a ratio of 60 to 1 raises a presumption of jury passion or prejudice. Consistent with a "general concern of reasonableness," the court also concludes that permitting this award to stand would make it constitutionally suspect.

The third *BMW* guidepost is a consideration of sanctions adopted by the legislature for comparable misconduct. National Union points to Insurance Code 790.035(a) which imposes a penalty of up to $10,000 for each act in violation of section 790.03. While this court has concluded that the punitive damage award is excessive for the other reasons stated above, the utilization of section 790.035(a) as a guidepost is of significantly less importance. It is noted that the "guideposts" reviewed by the Supreme Court were all for the purpose of assisting the court in determining whether the defendant received "fair notice not only of the conduct that will subject [it] to punishment but also of the severity of the penalty that a State may impose." *BMW* at 5750. Despite the civil

penalties provided by Section 790.035, California has a long history of permitting punitive damage awards where the evidence is sufficient to establish fraud or the malicious or oppressive breach of the covenant of good faith and fair dealing. Surely National Union does not contend, nor can it, that it did not have fair notice that the breach of the covenant of good faith and fair dealing could result in the imposition of substantial punitive damages under the common law. It is also significant to observe in this connection that despite the long history of these awards under the common law, the California legislature has not acted to impose any statutory limitation on such awards as it has, for example, with respect to negligence actions against health providers.

Accordingly, as noted at the outset, the court concludes that the punitive damage award in this case is excessive. Because the same jury must determine both punitive damages and liability, *Medo v Superior Court*, 205 Cal.App.3rd 64, 66-68 (1988), a new trial is ordered on the causes of action for fraud, breach of the covenant of good faith and fair dealing, and on the award of punitive damages. The new trial will be as to National Union only. The court has determined from the evidence, however, that an award of $1.7 million for punitive damages would be fair and reasonable. Therefore, if plaintiff files its written consent to reduce the award of punitive damages to the amount of $1.7 million, the motion for new trial will be denied. CCP 662.5. Plaintiff's written consent to the remittitur, should it choose to do so, is to be filed and served within 15 days of the date of this order.

Clerk to give notice to the parties

Dated: July 29, 1996 /s/ Raymond J. Ikola
Raymond J. Ikola
Judge of the Superior Court

Court of Appeal, First Appellate District, Division Four – No. G020323

S095924

IN THE SUPREME COURT OF CALIFORNIA

En Banc

TEXTRON FINANCIAL CORPORATION,
Plaintiff and Appellant,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, et al,
Defendants and Appellants.

(Filed May 2, 2001)

Petition for review DENIED.

GEORGE
Chief Justice

Court of Appeal, Fourth Appellate District,
Division Three – No. G020323

S095924

IN THE SUPREME COURT OF CALIFORNIA

En Banc

TEXTRON FINANCIAL CORPORATION,
Plaintiff and Appellant,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, et al,
Defendants and Appellants.

(Filed May 4, 2001)

The order filed on May 2, 2001, is hereby modified to reflect the above-captioned corrected district and division.

/s/ George
Chief Justice

Court of Appeal, Fourth Appellate District,
Division Three – No. G020323

S108979

IN THE SUPREME COURT OF CALIFORNIA

En Banc

TEXTRON FINANCIAL CORPORATION,
Plaintiff and Appellant,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, et al,
Defendants and Appellants.

(Filed Sep. 25, 2002)

Petition for review DENIED.

GEORGE
Chief Justice